EXEMPTION OF FUTURE INCOME PLANS ON DEATH

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ACKNOWLEDGMENTS

This report is a companion to our Report No. 91 on the exigibility of future income plans where we deal with the exigibility of future income plans during the life of the planholder. It became apparent that we should also deal with the related but discrete area of the transfer of such plans on death. Fortunately we were able to enlist the help of our former counsel Janice Henderson-Lypkie who had been responsible for previous reports in the area of succession and estate matters. Ms. Henderson-Lypkie was able to step in and carry out the additional work coordinating it with the work of Professor Dunlop. The Board was assisted by Ms. Henderson-Lypkie's usual rigorous analysis and clear presentation of the issues and we thank her for her work in this area.

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PART I — EXECUTIVE SUMMARY

In June 2002, the Alberta Law Reform Institute issued Consultation Memorandum No. 11, *Creditor Access to Future Income Plans*. This Consultation Memorandum examined the issue of whether registered retirement savings plans ('RRSPs'), registered retirement income funds ('RRIFs') and deferred profit sharing plans ('DPSPs') should be wholly or partially exempt from remedies of the creditors of the planholder before and after the death of the planholder. After considering the matter further, the Institute decided to examine the protection during life separately from the protection after death. This separation reflects the different considerations that come into play once the planholder has died, including taxation upon death and administration of the estate. Report No. 91, *Exemption of Future Income Plans* deals with creditor protection during the lifetime of the planholder. This report deals with creditor protection upon death of the planholder.

The principal issue in this report is whether RRSPs, RRIFs and DPSPs should be wholly or partially exempt from the remedies of the creditors of the deceased planholder. The report looks at all RRSPs, RRIFs and DPSPs, whether sold by insurance companies or not. It also looks at locked-in RRSPs and RRIFs which are created and regulated by pension legislation. A locked-in retirement account ('LIRA') is a type of RRSP designed to hold the commuted value of locked-in pension funds. After reaching a certain age, the owner of a LIRA must transfer the funds to a locked-in income fund, such as a life income fund ('LIF') or a locked-in retirement income fund ('LRIF'). A LIF and LRIF are special types of RRIFs. The result will be recommendations that apply to all RRSPs, RRIFs and DPSPs and these recommendations differ somewhat from the creditor protection that now exists for: (1) insurance RRSPs and RRIFs, and (2) LIRAs, LIFs and LRIFs. This report does not deal with other future income plans such as pensions, annuities not falling into the definition of RRSP in section 146 of the *Income Tax Act*, and retirement compensation arrangements. The other issue addressed in this report is whether following the death of the planholder, a RRSP, RRIF or DPSP should be exempt from attachment by creditors of the designated beneficiary.

The existing law as to when an RRSP, RRIF or DPSP is exempt from attachment or seizure by the creditors of the deceased planholder is convoluted. The question leads one into the area of law found at the intersection of insurance legislation, pension legislation, beneficiary designation legislation and the law of creditor-debtor remedies. The success of the creditor depends upon whether the financial institution that administers the RRSP or RRIF is or is not an insurance company, the source of funds used to purchase the RRSP, and the interpretation of beneficiary designation legislation. RRSPs and RRIFs sold by insurance companies are not assets of the estate of the deceased planholder and are not available for payment of debts of the deceased planholder if there is a valid beneficiary designation in favour of someone other than the estate of the deceased planholder. LIRAs, LIFs and LRIFs are governed by pension legislation and are also likely protected from attachment by creditors of the deceased planholder. It is unclear whether other RRSPs and RRIFs are available for payment of debts of the deceased planholder in situations in which the planholder has designated a beneficiary other than the estate. The answer depends upon the judicial interpretation of section 47 of the *Trustee Act*. There is no case law on this point in Alberta, but courts in other jurisdictions have come to three different conclusions. One line of cases held that the plan remains an asset of the estate and is available for payment of debts. The second line of cases held that the plan remains an asset of the estate but is the last asset to be used to pay the debts of the deceased planholder. The third line of cases held that the plan was not an asset of the estate and, therefore, was not available to satisfy debts of the deceased planholder. It is also unclear whether creditors of the deceased planholder can attach a DPSP. The result is that RRSPs, RRIFs and DPSPs are not all created equally when it comes to creditor protection, although all RRSPs, RRIFs, DPSPs are instruments for retirement savings.

It has long been Canadian public policy to encourage people to save for their retirement and to rely on private resources instead of public pensions. The *Income Tax Act* provides generous tax benefits to people who participate in pensions, RRSPs, RRIFs and DPSPs, as well as for the surviving spouse or common-law partner, or financially dependent child or grandchild of such a person. Alberta has pension legislation which exempts pension benefits from execution and garnishment, both during the lifetime of the employee and upon death of the

employee or former employee. These exemptions extend to benefits received under the pension plan by the surviving pension partner, or, if there is no surviving pension partner, by the designated beneficiary. The pension legislation also creates rights for the surviving pension partner that supersede any beneficiary designation. RRSPs and RRIFs sold by insurance companies do not form part of the estate of the deceased planholder if there is a valid beneficiary designation in favour of someone other than the estate of the planholder, nor are such insurance policies available for payment of the debts of the deceased planholder. This public policy guards against poverty in old age both for the employee and his or her dependants.

RRSPs and RRIFs for the self-employed are the equivalent of pension plans for employees. DPSPs are also retirement vehicles that are used to provide retirement income to employees. Given that RRSPs, RRIFs and DPSPs are retirement vehicles that serve the same purpose as pensions, they are deserving of creditor protection similar to that extended to pension plans, and this protection should exist both during the lifetime of the employee and upon death of the employee. Furthermore, all RRSPs and RRIFs should receive such protection, and it should not be dependent upon whether they were sold by insurance companies or were purchased with pension funds. In our opinion, there is no practical difference among ordinary RRSPs and RRIFs, insurance RRSPs and RRIFs, LIRAs, LIFs, LRIFs and DPSPs that would justify different treatment in this context. All these plans are retirement vehicles that serve the same purpose. In our opinion, the differential treatment that presently exists is incoherent and indefensible. The guiding principle should be that, subject to limited exceptions, all RRSPs, RRIFs and DPSPs including insurance products and products regulated by pension legislation should be shielded from attachment by creditors of the deceased planholder.

As always, there are a variety of options that could be used to implement this policy. One option is to enact that RRSPs, RRIFs and DPSPs do not form part of the estate of the deceased planholder if there is a beneficiary designation to someone other than the estate and, therefore, are not available to satisfy the creditors of the deceased planholder. The second option is similar, but it vests the plan in the designated beneficiary only if the beneficiary is a surviving spouse, common-law partner or dependent child or grandchild. (In this report, common-

law partner has the meaning given to that term in the *Income Tax Act*.) A third option is to enact that the RRSP, RRIF or DPSP remains an asset of the estate, but is exempt from attachment by creditors of the deceased planholder. The fourth option is similar to the third option, but the exemption would arise only if the designated beneficiary (or recipient of the plan) is the surviving spouse, common-law partner or dependent child or grandchild.

If RRSPs, RRIFs and DPSPs are to be treated identically to pensions, all benefits paid from the plans upon death of the planholder to someone other than the estate would be exempt from attachment by creditors of the deceased planholder. This could be accomplished using either option 1 or option 3. We do not, however, recommend these approaches because of the problems that arise in the administration of estates due to the taxation of RRSPs and RRIFs. In our opinion, there is an inherent unfairness in giving the moneys in the RRSP, RRIF or DPSP to an individual and leaving the tax liability with the estate which no longer has the asset that triggered the liability. Therefore, we prefer a system where the protection arises in those situations in which the moneys may be transferred on a tax-deferred basis to the designated beneficiary. This will ensure that RRSPs, RRIFs and DPSPs pass to the surviving spouse, common-law partner or financially dependent child or grandchild of the deceased planholder free of claims of creditors. This serves the fundamental policy of ensuring that RRSPs, RRIFs and DPSPs are available for the retirement of the planholder and his or her dependants. At the same time, it minimizes the situations in which the tax liability triggered by the RRSP, RRIF or DPSP remains with the estate, but the asset itself does not.

This brings the choice down to option 2 and 4. In our opinion, option 2 creates the necessary protection, certainty, and desirable flexibility that are needed in the context of death of a planholder. Where a surviving spouse, common-law partner or financially dependent child or grandchild is designated, any benefit payable under the RRSP, RRIF or DPSP upon death of planholder should not form part of the estate of the deceased planholder and should not be subject to claims of the creditors of the deceased planholder. In all other situations, the benefit paid upon death of the planholder from a RRSP, RRIF or DPSP should remain an asset of the estate and be available for satisfaction of creditors of the deceased planholder. This will provide a clear and simple rule for the protection of RRSPs,

RRIFs and DPSPs from creditors and will eliminate the complexity in the administration of estates that comes with option 4. While option 2 does remove the asset from the estate and thereby ensures that that asset is not available to satisfy an order under the *Dependants Relief Act*, this will only occur when a dependant receives the moneys from the RRSP, RRIF or DPSP. This minimizes one of the disadvantages of this model but still creates the creditor protection that is needed for RRSPs, RRIFs and DPSPs. Should a charity be the designated beneficiary of the plan, the plan would remain an asset of the estate and would be available for payment of creditors and for satisfaction of any order granted under the *Dependants Relief Act*.

Creating creditor protection based on the existence of a beneficiary designation for a RRSP, RRIF or DPSP will work well except in the context of LIRAs, LIFs and LRIFs. As discussed in Chapter 2, one of the distinguishing features of LIRAs, LIFs and LRIFs is the protection created for the surviving pension partner by pension legislation and the contract itself. So notwithstanding the fact that the planholder may have designated someone else, the pension partner will receive the LIRA, LIF or LRIF in certain situations. Protection of the surviving pension partner is a key component of Alberta pension legislation and should continue. A surviving pension partner should receive the benefit of the LIRA, LIF or LRIF free from claims of the creditors of the deceased planholder. Protection tied to the existence of a beneficiary designation in favour of a surviving spouse, common-law partner or dependent child or grandchild is insufficient to create the protection needed for pension partners. Pension partners are protected by pension legislation by reason of their status, and not by reason of the existence of a beneficiary designation. Therefore, we propose that whenever a pension partner receives a benefit under a LIRA, LIF or LRIF upon death of the planholder, the benefit should not form part of the estate of the deceased planholder and should not be available for payment of creditors of the deceased planholder. The benefit should vest in the pension partner notwithstanding the existence of a beneficiary designation in favour of another. This should not create a taxation problem for the estate because all pension partners will be entitled to defer payment of tax under the *Income Tax Act*, as they will fall into the definition of surviving spouse or common-law partner found in the *Income Tax Act*. The definitions used in the *Income Tax Act* are broader than the definition of pension

partner used in the *Employment Pension Plans Act* ("EPPA") and the regulations under the *Public Sector Pension Plans Act* ("PSPPA").

In the situations in which there is no surviving pension partner, the LIRA, LIF or LRIF is paid to the designated beneficiary, if any. In these situations, the benefit should not form part of the estate of the deceased planholder when the designated beneficiary is the surviving spouse, common-law partner or financially dependent child or grandchild of the deceased employee. It is necessary to include surviving spouses and common-law partners in this context because, while most surviving spouses and common-law partners will also be pension partners, this is not always the case. Two examples will illustrate the difference between the definitions. First, married persons who have lived separate and apart for more than three years would not be pension partners as defined in the EPPA but would be considered spouses under the *Income Tax Act*. All married persons who cohabit would be pension partners as defined in the EPPA and the regulations under the PSPPA. Second, a conjugal couple that cohabits for one year would be a common-law partner under the *Income Tax Act*, but would not be pension partners under the EPPA until they had cohabited for three years or there was a child of the relationship by birth or adoption.

In all other situations, the LIRA, LIF and LRIF will remain an asset of the estate and be available for satisfaction of creditors of the deceased planholder. For example, a LIRA, LIF or LRIF that is payable to the estate or to a designated beneficiary that is a charity or sibling will be available for satisfaction of creditors of the deceased planholder.

We recommend that the proposed legislation be found in the Trustee Act and apply notwithstanding any other act or law. This would restrict the protection that now exists for insurance RRSPs and RRIFs under section 580 of the *Insurance Act* and LIRAs, LIFs and LRIFs under pension legislation.

In Chapter 4, we examine whether RRSPs, RRIFs and DPSPs should be exempt from attachment by creditors of the designated beneficiary. We conclude that upon death of the planholder, the RRSP, RRIF or DPSP and the obligation to pay moneys from such plans should be exempt from all remedies of judgment

creditors of a designated beneficiary who is a surviving spouse, common-law partner or dependent child or grandchild. Additional protection is not needed in the situation in which the fund is collapsed and moneys are received by the designated beneficiary.

PART II — LIST OF RECOMMENDATIONS

RECOMMENDATION No. 1
Where a planholder designates a surviving spouse, common-law partner, or financially dependent child or grandchild as the beneficiary of a RRSP, RRIF or DPSP, any benefit payable under the plan upon the death of the planholder should not form part of the estate of the deceased planholder and should not be subject to claims of the creditors of the deceased planholder. In all other situations, the benefit paid upon death of the planholder from an RRSP, RRIF or DPSP should remain an asset of the estate and should be available for satisfaction of creditors of the deceased planholder. In this recommendation, common-law partner has the meaning given to it in section 248(1) of the federal *Income Tax Act*. 60

RECOMMENDATION No. 2
Recommendation 1 should apply to all RRSPs, RRIFs and DPSPs, including RRSPs and RRIFs issued by insurance companies and, subject to Recommendation 4, including LIRAs, LIFs and LRIFs. 61

RECOMMENDATION No. 3
The Canada Customs and Revenue Agency should examine the problems caused in the administration of estates by the current regime for taxation of RRSPs and RRIFs. These problems could be minimized by a withholding tax that applied after death of the planholder, or could be eliminated by taxing the RRSP or RRIF in the hands of the designated beneficiary. 61

RECOMMENDATION No. 4
Upon death of a planholder, any benefit payable under a LIRA, LIF or LRIF:

(a) to a pension partner as defined under the applicable pension statute, or

(b) pursuant to a valid beneficiary designation in favour of a surviving spouse, common-law partner or financially dependent child or grandchild

should not form part of the estate of the deceased planholder and will not be subject to claims of the creditors of the deceased planholder. 67

RECOMMENDATION No. 5
The new section dealing with whether RRSPs, RRIFs and DPSPs remain an asset of the estate of the deceased planholder should be part of the *Trustee Act* and should apply notwithstanding any other Act or law. 70

RECOMMENDATION No. 6

The new section should apply in the event of death of a planholder that occurs on or after the date that the legislation comes into force. 73

RECOMMENDATION No. 7

(a) Upon death of the planholder, the RRSP, RRIF or DPSP and obligation to pay moneys from such plans should be exempt from all remedies of judgment creditors of:
   (i) a surviving pension partner (where applicable), and
   (ii) a designated beneficiary who is a surviving spouse, common-law partner or dependent child or grandchild.

(b) Additional protection is not needed in the situation in which the fund is collapsed and moneys are received by the designated beneficiary. 79

PART III — REPORT

CHAPTER 1. INTRODUCTION

A. History of Project

[1] In June 2002, the Alberta Law Reform Institute issued Consultation Memorandum No. 11, *Creditor Access to Future Income Plans*. This Consultation Memorandum examined the issue of whether registered retirement savings plans ('RRSPs'), registered retirement income funds ('RRIFs') and deferred profit sharing plans ('DPSPs') should be wholly or partially exempt from remedies of the creditors of the planholder before and after the death of the planholder. After considering the matter further, the Institute decided to examine the protection during life separately from the protection after death. This separation reflects the different considerations that come into play once the planholder has died, including taxation upon death and administration of the estate. Report No. 91, *Exemption of Future Income Plans* deals with creditor protection during the lifetime of the planholder. This report deals with creditor protection upon death of the planholder.

B. Scope of Report

[2] The principal issue in this report is whether RRSPs, RRIFs and DPSPs should be wholly or partially exempt from the remedies of the creditors of the deceased planholder. The report looks at all RRSPs, RRIFs and DPSPs, whether sold by insurance companies or not. It also looks at locked-in RRSPs and RRIFs which are created and regulated by pension legislation.[1] A locked-in retirement account ('LIRA') is a type of RRSP designed to hold the commuted value of locked-in pension funds. After reaching a certain age,[2] the owner of a LIRA must transfer the funds to a locked-in income fund, such as a life income fund ('LIF') or

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[1] For a detailed discussion of these types of instruments see Alberta Law Reform Institute, *Exemption of Future Income Plans* (Report No. 91) (Edmonton: Alberta Law Reform Institute, 2004) [ALRI Rep. 91].

[2] The owner of a LIRA can transfer the funds in the account to a locked-in income fund at any time between his or her 50th birthday and December 31 of the year in which they turn 69. Most individuals transfer the assets before they reach age 69, but this must be done in the year that an owner turns 69.

a locked-in retirement income fund ('LRIF'). A LIF and LRIF are special types of RRIFs. The result will be recommendations that apply to all RRSPs, RRIFs and DPSPs and these recommendations differ somewhat from the creditor protection that now exists for: (1) insurance RRSPs and RRIFs, and (2) LIRAs, LIFs and LRIFs. This report does not deal with other future income plans such as pensions, annuities not falling into the definition of RRSP in section 146 of the *Income Tax Act*,[1] and retirement compensation arrangements.

[3] Since this report deals with RRSPs, RRIFs and DPSPs, we will briefly describe the nature of these plans in this chapter. For a more detailed description see Report No. 91, *Exemption of Future Income Plans*. LIRAs, LIFs and LRIFs are described in greater detail in Chapter 2 of this report. The taxation of RRSPs and RRIFs and the problems that this causes in the administration of estates are discussed in Chapter 3 of this report.

C. Terminology

1. Key definitions

[4] This report discusses a very technical area of the law. In an attempt to simplify the discussion, we will use specific terms to describe certain groups. These terms are defined as follows:

(1) 'common-law partner' means common-law partner as defined in section 248(1) of the *Income Tax Act*;[2]

(2) 'designated beneficiary' is the person who has been designated by planholder as the beneficiary of the plan;

(3) 'DPSP' means a deferred profit sharing plan as defined in section 147(1) of the *Income Tax Act*;[3]

(4) 'plan" means either a RRSP, RRIF or DPSP;

(5) 'planholder' means:

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[1] See definition of 'retirement savings plan' and 'retirement income' in the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 146(1).

[2] *Ibid*, s. 248(1).

[3] *Ibid*, s. 147(1).

(a) with respect to a registered retirement savings plan ('RRSP'), an annuitant as defined in section 146(1) of the *Income Tax Act*;[6]

(b) with respect to a registered retirement income fund ('RRIF'), an annuitant as defined in section 146.3(1) of the *Income Tax Act*;[7] and

(c) with respect to a deferred profit sharing plan ('DPSP'), an employee within the meaning of section 147 of the *Income Tax Act*.[8]

(In this report, the planholder is the person who owns the plan immediately before death.)

(6) 'plan administrator' means the financial institution with whom the planholder entered into the RRSP contract or arrangement or the RRIF contract or arrangement;

(7) 'qualified beneficiary' means the surviving spouse, common-law partner or financially dependent child or grandchild of the deceased planholder who receives a refund of premiums from a RRSP or a designated benefit from a RRIF;

(8) 'RRSP' means a registered retirement savings plan as defined by section 146(1) of the *Income Tax Act*;[9]

(9) 'RRIF' means a registered retirement income fund as defined in section 146.3(1) of the *Income Tax Act*;[10]

(10) 'valid beneficiary designation' is a designation that meets statutory requirements. The validity of beneficiary designations for life insurance RRSPs and RRIFs is governed by the *Insurance Act*.[11] The validity of beneficiary designations for ordinary RRSPs, RRIFs and DPSPs, and locked-in RRSPs and RRIFs is dealt with by section 47 of the *Trustee Act*.[12]

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[6] *Ibid*, s. 146(1).

[7] *Ibid*, s. 146.3(1).

[8] *Ibid*, s. 147.

[9] *Ibid*, s. 146(1).

[10] *Ibid*, s. 146.3(1).

[11] R.S.A. 2000, c. I-3, ss. 554, 574 and 576.

[12] R.S.A. 2000, c. T-8. There are many articles written concerning the validity of beneficiary designations. See John H. Langbein, "The Nonprobate Revolution and the Future of the Law of Succession" (1984) 97 Harv. L. Rev. 1108; James W. Lawrence, "Designations of Beneficiaries and

(continued...)

[5] It is essential that the reader have a clear understanding of RRSPs, RRIFs and DPSPs when reading this report. Therefore, the balance of this chapter gives a brief explanation of each of these plans so that the discussion of the existing law can be understood.

2. Registered Retirement Savings Plan

[6] The RRSP is a creation of the *Income Tax Act* designed to encourage Canadians to save for retirement on a tax-deferred basis. This legislation was introduced in 1957 but RRSPs truly became popular in 1991 when the maximum annual limit for contributions was increased.[1] A common feature of every RRSP is that it is registered under and governed by section 146 of the *Income Tax Act*. This is a prerequisite to obtaining the tax deduction familiar to most Canadians. A taxpayer can make contributions to the RRSP each year which are deductible in the year of the contribution. The total amount of the annual contributions is limited by three factors: a dollar limit, a percentage of the previous year's earned income, and the planholder's pension adjustment.[2] The money in the plan and any resulting investment earnings are not taxed while they remain in the plan. Moneys withdrawn from the RRSP are taxed in the year that the moneys are withdrawn.

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[1] (...continued)
Testamentary Dispositions" (1988) 46 Advocate 553; Barry S. Corbin, "Designating Beneficiaries" (1989) 9 Est. & Tr. J. 199 and 349; Barry S. Corbin, "Designating Beneficiaries", Case Comment (1989) 9 Est. & Tr. J. 265; Cy M. Fien, "*Waugh Estate v. Waugh*: More About the Nature of RRSPs", Case Comment (1990) 10 Est. & Tr. J. 37; R.F. Scane, "Non-Insurance Beneficiary Designations" (1993) 72 Can. B. Rev. 178; Eleanor L. Andres, "*Pecunk Estate v. Pecunk*", Case Comment (1995) 14 Est. & Tr. J. 4; Kieran A.G. Bridge, "Insurance Designations and Wills: When Shall the Twain Meet" (1995) 14 Est. & Tr. J. 68; Barry S. Corbin, "Beneficiary Designations for Federal Plans are not Governed by Provincial Law" (1995) 14 Est. & Tr. J. 95; Barry S. Corbin, "RRSP Beneficiary Designations and Ontario Probate Fee Planning" (1995) 14 Est. & Tr. J. 90; Barry S. Corbin, "Beneficiary Designations: Alberta's Trustee Act" (1995) 14 Est. & Tr. J. 1; Wolfe D. Goodman, "Re Probate Fee Planning for Ontario Estates" (1994) 13 Est. & Tr. J. 301; James F. Kennedy, "Problems with Beneficiary Designations" (1996) LSUC Special Lectures 173; Barry S. Corbin, "*Copeta v. Clark*, RRSP Designation of Beneficiary" (1997) 16 Est. & Tr. J. 290; Hara Marks, "Competing RRSP Beneficiary Designations" (2002) 6 Compensation & Benefits Update 6; Anne Werker, "Non-insurance RRSP Designations: Testamentary Dispositions of Property that Do Not Form Part of the Estate" (2003) 22 Est. Tr. & Pensions J. 103; David Norwood & John P. Weir, *Norwood on Life Insurance Law in Canada*, 3rd ed. (Toronto: Carswell, 2002) c. 11, The Designation of the Beneficiary.

[2] Jennifer Greenan, *Handbook of Canadian Pension and Benefit Plans*, 12 ed. (Toronto: CCH Canadian Limited, 2002) at 235.

[3] See definition of "RRSP deduction limit" and "unused RRSP deduction room" in the *Income Tax Act*, *supra* note 3, s. 146(1). For a more detailed discussion of this issue see KPMG, *Tax Planning for You and Your Family 2003* (Scarborough: Carswell, 2002) at 37.

The advantage of a RRSP is that it allows for tax-sheltered growth of the moneys in the plan which gives the taxpayer ultimately more money than if the funds had been invested in a similar manner and taxed in each year.[1] An RRSP is the only means that most self-employed individuals have to accumulate retirement savings on a tax-deferred basis.[2] They are also used by employees with pension plans who have room to contribute to an RRSP and employees without pension plans.

[7] Section 146 of the *Income Tax Act*[3] defines and regulates registered retirement savings plans, which are retirement savings plans that are registered with the Canada Customs and Revenue Agency ("CCRA"). This section also establishes certain conditions that must be included in every RRSP contract or arrangement. A retirement savings plan is a contract or arrangement under which the carrier agrees to provide a retirement income to the owner commencing at maturity.[4] Retirement income includes a life annuity (or joint life annuity with spouse or common-law partner) or a term certain annuity for a term equal to 90 minus the age of the owner (or minus the age of owner's spouse or common-law partner, if so elected by owner).[5] Maturity is the date fixed in the retirement savings plan for the commencement of any retirement income,[6] and must not be later than the end of the year in which the annuitant attains 69 years of age.[7] The owner of the RRSP can also choose to transfer the plan to another RRSP or RRIF

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[1] See KPMG, *ibid.* at 40.

[2] Greenan, *supra* note 13 at 236, for a good introduction to RRSPs see c. 10 at 235-241. The CCRA also produces a guide, information circulars and interpretation bulletins that deal with RRSPs. These can be located on the CCRA website. For an index of CCRA publications related to RRSPs and RIFs see online: http://www.ccra-adrc.gc.ca/tax/registered/rsp-e.html. An RRSP is not the only means that the self-employed have to accumulate retirement savings on a tax-deferred basis. Some self-employed people (for example, doctors) have their professional corporation or incorporated business sponsor a "plan for specified individuals" which is a registered pension plan. These are treated slightly differently than other pension plans by CCRA and provincial pension regulators.

[3] *Supra* note 3.

[4] See definition of "registered savings plan" in *Income Tax Act*, *supra* note 3, s. 146(1).

[5] See definition of "retirement income", *ibid.*

[6] See definition of "maturity", *ibid.*

[7] This is a standard term of all RRSP issued after 1997 and is a deemed term for plans issued before then. See *ibid.*, ss. 146(2)(b.4), 146(12), 146(13.2) and 146(13.3).

prior to maturity of the plan without having to pay tax on the amount transferred.[22] At any time the owner of the RRSP can withdraw moneys from the RRSP but these moneys become income of the taxpayer in the year they are withdrawn and tax is paid at that time. Therefore, funds from a RRSP can be used to purchase a life annuity or a term-certain annuity, or be transferred to a RRSP or RRIF, or can be paid to the owner of the plan.

[8] In the year the owner of the RRSP turns 69, the owner must wind up the RRSP. There are three options for maturing the RRSP.[23] First, the owner may withdraw the funds from the plan and pay the income tax that will be triggered. Second, the owner may purchase an annuity to provide a "retirement income". In this case, the RRSP proceeds used to purchase the annuity are not taxed immediately. Instead, the annuity payments are taxed when received. The third option is to convert the RRSP to a RRIF.[24]

[9] In recent years, group RRSPs have gained popularity. With group RRSPs the employer makes contributions to the RRSP of the employee, but that contribution is considered salary of the employee for income tax purposes. The *Income Tax Act* treats group RRSPs as a collection of individual RRSPs.[25]

3. Registered Retirement Income Fund

[10] Parliament added section 146.3 to the *Income Tax Act* in 1978 and thereby created RRIFs. Section 146.3 establishes the conditions that must be included in every RRIF.[26] A RRIF is a retirement income fund registered with the CCRA. A RRIF is an arrangement whereby the carrier agrees to make payments to the annuitant and, if the annuitant so elects, to the annuitant's spouse or common-law partner after the annuitant's death, in consideration of the transfer of property to

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[22] *Ibid.*, s. 146(16)(a) and IT-528: Transfer of Funds Between Registered Plans.

[23] This discussion focuses on ordinary RRSPs, which are ones that were not purchased with the commuted value of locked-in pension benefits. Locked-in RRSPs will be discussed in more detail in c. 2.

[24] KPMG, *supra* note 14 at 268-269.

[25] Greenan, *supra* note 13 at 237-240 and IC 72-22R9: Registered Retirement Savings Plans at para. 12.

[26] *Income Tax Act*, *supra* note 3, s. 146.3(2).

the carrier.[27] The payments must begin in the year following the year in which the RRIF was created. Each year the owner must withdraw from the RRIF a minimum amount that is established by section 146.3.[28] The minimum amount is a percentage of the value of the fund at the beginning of the year and depends on age.[29] While a minimum amount is imposed, there are no restrictions on the maximum that can be withdrawn at any time and the owner can withdraw all of the funds at anytime if the owner so chooses. Each withdrawal is taxed in the year that it is received.

4. Deferred Profit Sharing Plan

[11] There are several different types of profit sharing plans, but the one dealt with in this report is a deferred profit sharing plan (DPSP).[30] DPSPs are regulated by section 147 of the *Income Tax Act*.[31] Under a DPSP, contributions are paid by the employer out of profits to a trustee who holds and invests the contributions for the employees. Contributions are not made if the corporation failed to make a profit that year. DPSPs are frequently used as a retirement income vehicle by themselves, or can be used as a supplement to a registered pension plan. The difference between a DPSP and a registered pension plan is that lump sum distributions from a DPSP are allowed on retirement, which is not the case for registered pension plans. Also, a DPSP is not subject to pension legislation.[32] The other major difference is that the maximum employer contribution for a DPSP is lower than the contributions allowed for a registered pension plan. Before 1991, employees could contribute their own funds to DPSP, but since 1991 employee contributions have not been allowed.

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[27] For a good discussion of RRIFs see IC78-18R6: Registered Retirement Income Funds.

[28] See definition of 'minimum amount' in the *Income Tax Act*, *supra* note 3, s. 146.3(1) and discussion of minimum amount in IC78-18R6: Registered Retirement Income Funds and KPMG, *supra* note 14 at 269.

[29] See Greenan, *supra* note 13 at 242-44 and KPMG, *supra* note 14.

[30] For a good discussion of DPSPs see Greenan, *supra* note 13 at 244-249 and David Tyson, *Profit Sharing in Canada* (Toronto: John Wiley & Sons, 1996) at 10-11 and 93-104.

[31] Other sections that relate to DPSP include *supra* note 3, ss. 198-207.2.

[32] For example, see *Employment Pension Plans Regulation*, A.R. 35/2000, s. 1(5)(a) and *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.), s. 4(2)(a).

[12] The employer makes payment to a trustee who invests the contributions for the employees. This trustee is usually a trust company,[33] but may be individuals as well. The employer can deduct the contributions as expenses for tax purposes, but the employees are not required to pay tax on the moneys until they are withdrawn from the plan. The contributions that vest in an employee must be paid upon termination of the employment, and under certain plans, may be paid while the employee is still working for the corporation. The ability to withdraw the moneys during employment is usually limited to withdrawals for the purchase of a house, the financing of a child's education or in the event of major illness.[34] All amounts vested in the employee (or his or her beneficiary or estate upon death) must become payable no later than 90 days after the earliest of the following:[35]

(a) the end of the year in which the employee turns 69, or

(b) 90 days after the earliest of the following:

(i) date of employee's death

(ii) date that individual ceases to be employed by employer, or

(iii) date of winding up of plan.

The payment to the employee (or designated beneficiary or estate) can be made in one of the following ways: (a) lump sum payment, (b) periodic payments at least annually for up to 10 years, and (c) for the purchase of an annuity where the payments begin on or before the employee's 69 birthday.[36]

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[33] Greenan, *supra* note 13 at 245.

[34] Tyson, *supra* note 30 at 96-98.

[35] *Income Tax Act*, *supra* note 3, s. 147(2)(k) and Greenan, *supra* note 13 at 247.

[36] *Income Tax Act*, *ibid.*, s. 147(2)(k) and Greenan, *ibid.* at 248.

CHAPTER 2. THE EXISTING LAW

A. Introduction

[13] In this chapter, we examine when a RRSP, RRIF or DPSP is exempt from attachment or seizure by the creditors of the deceased planholder under the existing law.[17] The question leads us into the area of law found at the intersection of insurance legislation, pension legislation, beneficiary designation legislation and the law of creditor-debtor remedies. The result is that RRSPs, RRIFs and DPSPs are not all created equal when it comes to creditor protection, although all RRSPs, RRIFs, DPSPs are instruments for retirement savings.

B. Registered Retirement Savings Plan

[14] Banks, trust companies, credit unions, insurance companies, and fraternal benefit societies all sell RRSP products to the public. Over time a RRSP can become a very valuable asset, and is often one of the few valuable assets a debtor may have at the end of a period of financial difficulties. This reality has given rise to numerous attempts by creditors to execute against or seize RRSP products. The success of the creditors depends upon whether the financial institution that administers the RRSP is or is not an insurance company, the source of the funds used to purchase the RRSP, and the interpretation of beneficiary designation legislation.

1. Insurance RRSPs

[15] Insurance companies have since Confederation sold annuities to the public.[18] The courts did not categorize an annuity as life insurance because there is no life insurance risk involved.[19] Since all RRSPs contain an undertaking to pay an

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[17] For a discussion of this issue during the lifetime of the planholder, see ALRI Rep. 91, *supra* note 1.

[18] For a general discussion of annuities see Bruce R. McDonald, *Life and Disability Insurance Laws of Canada (Common Law Provinces)* (Toronto: Canadian Association of Insurance and Financial Advisors, 2000) c. 15 and Alberta Law Reform Institute, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act* (Report No. 68) (Edmonton: Alberta Law Reform Institute, 1993) at 40 [ALRI Rep. 68].

[19] See *Gray v. Kerslake*, [1958] S.C.R. 3; *Scott Estate v. Manufacturers Life Insurance Co.*, [1974] 1 W.W.R. 112 (Man. Q.B.); *Trustee in Bankruptcy of Neuls v. Neuls* (1985), 17 D.L.R. (4th) 554 (Sask.

(continued...)

annuity at a fixed or determinable future time,[40] a RRSP issued by an insurance company was treated as an annuity, and not life insurance.[41] Initially, such an annuity did not receive the protection from creditors afforded to life insurance.[42] In the period between 1974 and 1985, the definition of 'life insurance' found in all insurance statutes in the common-law provinces of Canada was amended to include annuities.[43] In 1981, the definition of 'life insurance' found in the *Insurance Act*[44] of Alberta was expanded to include an undertaking to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount.[45] The extended definition of life insurance meant that RRSPs issued by insurance companies would receive the creditor protection afforded life insurance by the *Insurance Act*.[46]

[16] The relevant provisions in the *Insurance Act* are as follows:

> Definitions
>
> 1 In this Act,
>
> (ee) 'insurance money' includes all insurance money, benefits, surplus, profits, dividends, bonuses and annuities payable by an insurer under a contract of insurance;
>
> Definitions
>
> 554 In this Subpart,
>
> (b) 'beneficiary' means a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by declaration;

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[39] (...continued)
C.A.) [*Neuls*].

[40] This is a requirement of registration under the *Income Tax Act*, *supra* note 3, s. 146. See definition of 'retirement savings plan' and 'retirement income' found in *Income Tax Act*, *supra* note 3, s. 146(1).

[41] For example, see *Neuls*, *supra* note 39.

[42] *Ibid.*

[43] McDonald, *supra* note 38 at C15-5.

[44] *Supra* note 11.

[45] *Insurance Amendment Act, 1981*, S.A. 1981, c. 49, s. 240.1.

[46] *Christensen (Trustee of) v. Christensen* (1996), 184 A.R. 194 (C.A.) at para 24; *Re Kozak* (1995), 175 A.R. 182 (Q.B.); *Sun Life Assurance Company of Canada v. Canada (Revenue)* (1997), 196 A.R. 179 (C.A.).

Annuity deemed life insurance

555 For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for

(a) a term certain,

(b) a term dependent either solely or partly on a human life, or

(c) a term dependent solely or partly on the happening of an event not related to a human life.

Irrevocable designation

575(1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, must not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate.

(2) When the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

Insurance money not part of the estate

580(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of creditors of the insured.

(2) While a designation in favour of a spouse or adult interdependent partner, child, grandchild or parent, or any of them, of a person whose life is insured is in effect, the insurance money and the rights and interest of the insured in the insurance money and in the contract are exempt from writ proceedings.

[17] After the definition of life insurance was expanded, there were several unsuccessful attempts to argue that a RRSP issued by an insurance company[47] was not an undertaking to provide an annuity. The courts have held that a RRSP issued by an insurance company was an undertaking to provide an annuity (and, therefore was life insurance) notwithstanding it contains the following clauses:[48]

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[47] These contracts are given many titles including annuity-type RRSP, redeemable deferred annuity contracts, and variable annuity contract. For a discussion of the common types of annuities offered by insurance companies, see McDonald, *supra* note 38 at 15-4. Note that the choice of annuity available to annuitant under a RRSP is also defined by the *Income Tax Act*, *supra* note3.

[48] *Canada (Minister of National Revenue) v. Anthony* (1995), 124 D.L.R. (4th) 575.

(1) The planholder can collapse the plan at any time;[49]

(2) The planholder can transfer the assets in the RRSP to another RRSP or to a RRIF;[50]

(3) The life insurance company can terminate the plan upon notice to the planholder;[51]

(4) The promise to provide an annuity depends on an election made by the planholder;[52] and

(5) No election had been made to receive any part of the fund as an annuity and therefore there was no current obligation to provide annuity payments.[53]

[18] As a result, a RRSP issued by an insurance company is exempt from seizure during the lifetime of the planholder when the designated beneficiary is a spouse, adult interdependent partner, child, grandchild or parent.[54] Upon death of the planholder, the assets in the RRSP issued by a life insurance company do not form part of the estate of the deceased planholder if someone other than personal representative of the deceased planholder is designated as the beneficiary of the RRSP. The assets in the RRSP become property of the designated beneficiary and are not subject to claims of the creditors of the planholder.[55] Should there be no beneficiary designation, or should the beneficiary be the personal representative of

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[49] *Anthony*, *ibid.*; *Re Kozak*, *supra* note 46.

[50] *Anthony*, *ibid.*

[51] *Ibid.*; *Re Sykes* (1998), B.C.J. No. 102 (C.A.).

[52] *Anthony*, *ibid.*

[53] *Anthony*, *ibid.*; *Re Sykes*, *supra* note 51; *Re Kozak*, *supra* note 46.

[54] *Anthony*, *ibid.*; *Sun Life Assurance*, *supra* note 46; *Re Sykes*, *supra* note 51.

[55] *Insurance Act*, *supra* note 11, s. 580(1). See also D. Shawn McReynolds, "Sheltering RRSP Assets from Creditors on Death" (1983) 6 E.T.Q. 106 at 107-109; C.M. Fien, "*Waugh Estate v. Waugh*: More about the nature of RRSPs" (1990-91) 10 E.T.J. 37 at 43; David J. McKee, "Debtor-Creditor Issues Affecting Annuity Contracts" (1993) 12 E.T.J. 247 at 248-50; Colin H.H. McNairn, "Investments in Segregated Funds: Their Protection from Creditors" (1996) 27 Can. Bus. L.J. 161 at 173-74.

the estate,[56] the assets in the RRSP form part of the estate and are available for the payment of creditors of the deceased planholder.

2. Locked-in retirement accounts

a. What is a locked-in retirement account?

[19] With certain limited exceptions that differ by jurisdiction,[57] all federal and provincial pension legislation prevents employees from cashing in their locked-in[58] pension benefits upon the termination of employment at any time before they are old enough to receive the pension. Instead, the employee is given certain options by the pension legislation that are designed to preserve the value of the pension benefits. For example, upon termination of employment before retirement, section 38 of the *Employment Pension Plans Act* (*EPPA*)[59] permits the employee to transfer the commuted value of the locked-in pension benefit to one of the following options:

(a) another pension plan,

(b) a locked-in retirement account (LIRA), or

(c) if the plan so provides, to an insurance company to purchase a life annuity that is not commutable, or

(d) if the plan so provides, to a financial institution to purchase a Life Income Fund (LIF) or Locked-in Retirement Income Fund (LRIF)

The *EPPA* also provides for the transfer of the commuted value of a pension to a LIRA in other situations. This option is available for a suspended member in certain situations under section 30(5) of the *EPPA*; for a member of a plan that has

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[56] This flows from the definition of beneficiary found in the *Insurance Act*, *supra* note 11, s. 554.

[57] One such exception came into effect in Alberta on May 14, 2003 with the coming into force of *Employment Pension Plans (Financial Hardship Withdrawal - 2003) Amendment Regulation*, A.R. 133/2003. This regulation added s. 41.1 and Schedule 4 to the *Employment Pension Plans Regulation*, *supra* note 32. The amendment applies to all LIRAs, LIFs and LRIFs, but does not apply to money that remains in a pension plan. S. 41.1 of the regulations allows planholders to access the money in LIRAs, LIFs and LRIFs if they encounter financial hardship and need due to illness, accident or loss of a job. The planholder will have to complete an application that will be submitted to the Superintendent of Pensions. An advisory committee will make recommendations on applications to the Superintendent. Schedule 4 sets out the process that must be followed.

[58] In the context of pension legislation, "locked-in" is a term used to describe the fact that the employee cannot withdraw all or part of the commuted value of the pension in cash. The employee can only receive retirement income once the pension benefits are locked-in. See *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, s. 35 [*EPPA*]. This is discussed in more detail later in the text.

[59] *Ibid.*

been terminated (see section 38(1)(a)); for a pension partner[60] who receives a pre-retirement death benefit under section 39 of the *EPPA*; and in certain situations set out in section 64(3) in the event of marriage breakdown.[61]

[20] A LIRA is a restricted form of RRSP specifically designed to hold locked-in pension funds.[62] This type of investment vehicle is subject to the rules applicable to RRSPs under the *Income Tax Act* as well as the rules established in the *EPPA* and the *Employment Pension Plans Regulation*.[63] Each LIRA contract must include all the definitions and restrictions created by the *EPPA* and regulations.[64] These restrictions are designed to ensure that the employee and pension partner receive retirement income for life on terms that are similar to what they would have received under the pension plan. Therefore, there are restrictions on withdrawal by the planholder of the LIRA and protection for the planholder's pension partner that is the same as that created for pensions under the Act. If the

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[60] The *EPPA*, *ibid.* defines pension partner as follows:

> 1(1)(ff.1) 'pension partner' means, in relation to another person,
>
> (i) a person who, at the relevant time, was married to that other person and had not been living separate and apart from that other person for 3 or more consecutive years, or
>
> (ii) if there is no person to whom subclause (i) applies, a person who, immediately preceding the relative time, had lived with that other person in a conjugal relationship
>
> (A) for a continuous period of at least 3 years, or
>
> (B) of some permanence, if there is a child of the relationship by birth or adoption;

[61] *EPPA*, *ibid.*, s. 37(2), deals with excess contributions made by the employee to a pension plan. If excess contributions are made to the plan (as defined in s. 37(1)), the excess contribution can be returned to the member or the person who is to receive a benefit should the member die before retirement in certain situations. Alternatively, the excess contribution can be transferred to another pension plan, a RRSP, and other options set out in s. 37(2). Of interest is the fact that excess contributions can be paid into an ordinary RRSP, as opposed to a LIRA.

[62] Most other provinces have created similar investment vehicles. In several other provinces they are called "locked-in RRSPs".

[63] *Employment Pension Plans Regulation*, *supra* note 32. For a good discussion of LIRAs, see Alberta Superintendent of Financial Institutions, Policy Bulletin No. 10 – "Locked-in Retirement Account" online: <http://www.finance.gov.ab.ca/publications/pensions/pdf/polbull10.pdf>.

[64] The LIRA conditions are set out in the *Employment Pension Plans Regulation*, *ibid.*, s. 39. *EPPA*, *supra* note 58, s. 82(6) also provides that if pension money is transferred to another pension plan, a LIRA, a retirement income arrangement or pension with an insurance business, the money is held pursuant to the same conditions imposed by ss. 35, 39 and 40 as would have applied if the transfer had not been made.

financial institution incorrectly releases funds in the LIRA, that institution remains liable to provide the appropriate amount of retirement income.[65]

[21] The first feature that distinguishes a LIRA from other RRSPs is the fact that the moneys are locked in. This means that the planholder cannot cash in the LIRA at any time, as in the case of other RRSPs. All money in the LIRA is to be used to provide a pension that would be required or permitted by the *EPPA* and regulations.[66] Therefore, money in a LIRA can only be used by the planholder as follows:[67]

(a) to transfer the money to another LIRA,
(b) to purchase a life annuity contract with certain conditions,
(c) to transfer the money to a pension plan, or
(d) to transfer the money to purchase a LIF or LRIF (referred to as a retirement income arrangement).

[22] The second feature[68] that distinguishes a LIRA from other RRSPs is the protection for pension partners created by the *EPPA* and regulations. If the planholder has a pension partner when the life annuity is purchased, the annuity must be a joint and survivor annuity which provides payments of at least 60% of the original annuity amount to the surviving pension partner for his or her life. The purchase of any other type of annuity or the transfer of the funds to a LIF or LRIF is not allowed unless the pension partner waived his or her rights to the joint and survivor annuity.[69] Similarly, if there are any funds in the LIRA as of the death of the planholder, the funds will be used to provide a pension for the surviving pension partner even if the planholder had designated another beneficiary. In this

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[65] *Employment Pension Plans Regulation*, *ibid.*, s. 39(10)(e).

[66] *Employment Pension Plans Regulation*, *ibid.*, s. 39(10)(a).

[67] *Employment Pension Plans Regulation*, *ibid.*, s. 39(10)(b).

[68] There are a few other distinguishing features but they are not relevant to the issues examined in this report.

[69] *Employment Pension Plans Regulation*, *supra* note 32, s. 39(10)(h).

circumstance, the surviving pension partner has the choice of transferring the LIRA assets to one of the following options:[70]

(a) a non-commutable life annuity for the pension partner that begins payments no earlier than age 50

(b) a LIRA for the pension partner, or

(c) a LIF or an LRIF for the pension partner anytime after attaining age 50.

If the deceased planholder has no surviving pension partner as of the date of death, then the funds in the LIRA will be paid to the designated beneficiary, and if there is no designated beneficiary, the funds are paid to the personal representative of the estate of the deceased planholder.[71] For ordinary RRSPs, the surviving pension partner of the planholder does not have any right to share in the RRSP unless the planholder designates the pension partner as the beneficiary, and the planholder can choose to designate a pension partner or any other person he or she chooses to benefit.

[23] The *EPPA* and regulations govern private-sector pensions, while the *Public Sector Pension Plans Act*[72] ("*PSPPA*") and regulations[73] govern most of the public-sector pensions. The public-sector pension plans governed by the *PSPPA* include the Local Authorities Pension Plan, the Public Service Pension Plan, the Special Forces Pension Plan, the Management Employees Pension Plan and the Public Service Management (Closed Membership) Pension Plan. Each plan is governed by sections 1 to 12 of the *PSPPA* and regulations common to all such plans,[74] as well as the schedule in the *PSPPA* and regulations that apply only to that specific

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[70] *Employment Pension Plans Regulation*, *ibid.*, s. 39(10)(i).

[71] *Employment Pension Plans Regulation*, *ibid.*, s. 39(10)(j). This is also a term of each LIRA contract.

[72] R.S.A. 2000, c. P-41 [*PSPPA*].

[73] There is one regulation that relates to all plans, and a further separate regulation for each individual plan. See *Public Sector Pension Plans (Legislative Provisions) Regulation*, A.R. 365/1993; *Local Authorities Pension Plan*, A.R. 366/1993; *Management Employees Pension Plan*, A.R. 367/1993; *Public Service Pension Plans Regulation*, A.R. 368/1993; *Special Forces Pension Plan*, A.R. 369/1993. Effective January 1, 2001, the University Academic Pension Plan became a non-statutory pension plan subject to the *EPPA*. Before then it was subject to the *PSPPA*.

[74] See *Public Sector Pension Plans (Legislative Provisions) Regulation*, *ibid.*, s. 1-12.

plan.[75] The *PSPPA* and regulations that govern each plan also allow for the transfer of commuted value of pension benefits to LIRAs in certain situations. When the commuted value of a pension is transferred from a public-sector plan to a LIRA, the *EPPA* and the regulations under it apply (and particularly their protection provisions for pension partners) rather than the public-sector plan rules.[76] Therefore the rules discussed above for LIRAs under the *EPPA* also apply to LIRAs created from public-sector pension plans governed by the *PSPPA*.

b. Creditor protection under pension legislation

[24] Under this part, we examine the creditor protection for LIRAs under the *EPPA* and the *PSPPA* in the context of death of the planholder of the LIRA. To begin, we will look at creditor protection when the pension benefits remain a part of the pension plan immediately before death and then we will examine the creditor protection available where the commuted value of the pension benefit had been transferred to a LIRA before death of the planholder of the LIRA.

[25] Creditor protection for pension benefits paid by the pension administrator upon the death of the employee (or former employee) is extended in two different ways: (1) preventing attachment of the benefit by creditors of the deceased, and (2) declaring that a benefit paid on death is not part of the estate of the deceased. The *EPPA*[77] uses the first method. Section 85 of that Act provides as follows:

> 85(1) Subject to subsection (2), benefits, money that has been transferred under section 30(5), 37(2), 38, 39(6) or 64(3) or the regulations made in respect of section 80 or pursuant to a similar transfer made before January 1, 1987 and money earned by such transferred money may not be assigned, charged, alienated or anticipated and are exempt from execution, seizure or attachment either at law or in equity, and any transaction purporting to assign, charge, alienate or anticipate benefits or any such money is void.
>
> (2) Subsection (1) does not apply to additional voluntary contributions or optionally ancillary contributions. . . .

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[75] See the regulations cited in note 73 plus the schedules for each plan found in the *Public Sector Pension Plans (Legislative Provisions) Regulation*, *ibid*. Note that there is no separate regulation that deals with the Public Service Management (Closed Membership) Pension Plan. That plan is subject to the *PSPPA*, *supra* note 72, ss. 1-12 and Schedule 6.

[76] See s. 34 of each regulation governing a specific plan. For example, see *Local Authorities Pension Plan*, *supra* note 73, s. 34.

[77] *Supra* note 58.

Section 1(1)(e) of the *EPPA* defines benefit to mean "a pension or any other benefit under a pension plan, and includes a return of contributions to or in respect of a member or former member, any payment in a series of payments that constitutes a benefit and future entitlements to any such benefit, but does not include a refund of surplus assets". This definition would include a pre-retirement death benefit paid under section 39 of the *EPPA* to the surviving pension partner or designated beneficiary.

[26] The *Public Sector Pension Plans (Legislative Provisions) Regulation*[78] uses the second method.[79] Section 12(3) of this regulation reads as follows:

> 12(3) A benefit paid on the death of any person otherwise than to the personal representative of a deceased's estate is not part of the estate of the deceased and is not subject to the claims of his creditors.

This particular regulation does not define benefit, but the Regulations that apply to the individual public-sector pension plans each have the same definition for benefit. For each plan, benefit is defined to mean a retirement benefit, a death benefit or a benefit on termination before pension eligibility, under Part 5.[80] There are a variety of different benefits paid on death under Division 1 (Retirement benefits) and Division 2 (Death Benefits) of Part 5 of the regulation for each plan that would all be caught by the phrase "benefit paid on the death of any person".

[27] Both methods ensure that the deceased's creditors cannot attach a benefit paid upon death of the employee or former employee by the plan administrator to a third party.[81] However, a creditor might argue that a pre-retirement death benefit

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[78] *Supra* note 73.

[79] A similar provision is found in *The Teacher's Pension Plans (Legislative Provisions) Regulation*, A.R. 204/95, s. 16(3).

[80] For example, see *Public Service Pension Plans Regulation*, *supra* note 73, s. 2(1)(h).

[81] The *EPPA*, *supra* note 58, makes a distinction between a pre-retirement death benefit and a post-retirement death benefit. By virtue of s. 39, if a member dies before retirement, benefits are paid to the member's surviving pension partner. If there is no surviving pension partner, the benefit is paid to the designated beneficiary or, if there is no valid designation of beneficiary to the personal representative of the member's estate in their representative capacity. By virtue of s. 40, if a member had a pension partner at the time the pension commenced, that member must take a joint life pension for the benefit of both the member and the pension partner, unless the non-member pension partner waives this entitlement. These provisions may create a property entitlement in the benefit in the surviving pension partner and therefore make the benefit unavailable for satisfaction of creditors of the deceased. This

(continued...)

paid under the *EPPA* remains an asset of the estate (and therefore is available for payment of the debts of the deceased) because the *EPPA* does not have a provision similar to 12(3) of *Public Sector Pension Plans (Legislative Provisions) Regulation*.[52] This argument is unlikely to succeed given that the surviving pension partner has rights created by the *EPPA* itself which could be viewed as vesting the death benefit in the surviving pension partner on death and given that such an interpretation would defeat the creditor protection created by section 85 of the *EPPA*.[53]

[28] What is unclear is whether a benefit paid to the estate of the deceased is available for payment of debts of the deceased. The wording of section 12(3) of the *Public Sector Pension Plans (Legislative Provisions) Regulation*[54] would suggest that moneys paid to the estate remain an asset of the deceased and are therefore available for payment of debts. Section 85 of the *EPPA* does not address this issue. However, one Ontario case has construed similar legislation as protecting pension moneys paid to the personal representative of a deceased bankrupt from attachment by creditors.[55] There is no case law addressing this issue in Alberta.[56]

[29] We now turn to examination of creditor protection for LIRAs under the *EPPA*, which applies to all LIRAs created under the *EPPA* and *PSPPA*.[57] As discussed above sections 30(5), 38, 39(6) and 64(3) of the *EPPA* allow for transfer

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(...continued)
may also be an effective method of creditor protection.

[52] *Supra* note 73.

[53] See *Miles Estate v. Miles* (1997), 35 O.R. (3d) 312 (Gen. Div.).

[54] *Supra* note 73.

[55] *Miles Estate v. Miles*, *supra* note 83.

[56] The issue was raised but not decided in *Re Burke*, [1988] A.J. No. 1146. Query whether the result would be different if there was no bankruptcy.

[57] See earlier discussion of treatment of LIRAs created under public-sector pension plans governed by *PSPPA*, *supra* note 72.

of the commuted value of pension benefits to a LIRA.[88] Therefore, by virtue of section 85 of the *EPPA*, money that has been transferred into a LIRA and money earned by such transferred money are exempt from execution, seizure and attachment. It is also a term of the LIRA contract, following from the regulations, that "the money . . . is exempt from execution, seizure or attachment".[89] It follows that funds in a LIRA at the time of death of the planholder of the LIRA are not available for attachment by the creditors of the deceased planholder and the creditor cannot force the financial institution to pay these moneys to the creditor.[90]

[30] In turn, the financial institution must pay the funds in the LIRA according to the terms of the contract, which reflect the requirements of the *EPPA* and regulations. If there are moneys in the LIRA upon death of the planholder, the moneys must be used to provide a pension to the surviving pension partner. The surviving pension partner has the choice of using the moneys to purchase an annuity, a LIRA or a LIF or LRIF. Transfer of the moneys from a LIRA to one of these options would result in an annuity or plan that is also subject to creditor protection. However, if the planholder of the LIRA has no surviving pension partner then the balance in the LIRA will be paid to the designated beneficiary, or if there is no valid designation, to the estate of the deceased planholder. Query whether the creditor could attach the funds once they were paid to the designated beneficiary or the estate?[91]

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[88] *EPPA*, *supra* note 58, s. 1(1)(e).

[89] *Employment Pension Plans Regulation*, *supra* note 32, s. 39(10)(e).

[90] We could discover no case dealing with the situation on death. There are several cases that interpret differing pension legislation that hold that the creditor of the planholder of the LIRA cannot attach the LIRA because of provisions in the particular pension statute. See *Churchill (Trustee of) v. Churchill*, [1993] 3 W.W.R. 665 (Sask. Q.B.); *Royal Bank of Canada v. Miller* (1993), 107 Sask. R. 300 (Q.B.); *Re Byrne* (2003), 41 C.B.R. (4th) 6, 2003 ABQB 216, Master Funduk. The Saskatchewan cases interpret a section similar to the *EPPA*, *supra* note 58, s. 85. They conclude that this section would have protected the locked-in RRSP if the legislation had been in force at the date of the bankruptcy, but that was not the case in the facts before the courts.

[91] For a more detailed discussion of whether creditors can attach LIRAs, LIFs and LRIFs during the lifetime of the planholder see ALRI Rep. 91, *supra* note 1, c. 2. The *Pensions Benefits Act*, R.S.O. 1990, c. P.8 does a much better job of making it clear that a locked-in RRSP is protected from creditors. That section reads as follows:

> 66(1) Money payable under a pension plan is exempt from execution, seizure or attachment.
> (2) Money transferred from a pension fund to a prescribed retirement savings arrangement or for the purchase of a life annuity under section 42, 43 or 48 or subsection 73(2) is exempt

(continued...)

c. *Creditor protection under the Insurance Act*

[31] LIRAs can only be sold by financial institutions acknowledged by the Superintendent of Pensions.[92] The list of acknowledged financial institutions includes certain banks, credit unions, fraternal benefit societies, insurance companies, trust companies and Alberta Treasury Branch.[93] Given that LIRAs can be sold by some life insurance companies, the issue arises whether they are life insurance that falls within the protection created by section 580(1) of the *Insurance Act*. Since LIRAs are a restricted form of RRSP and since RRSPs have been held to be an annuity that falls into the definition of life insurance, a LIRA may also be entitled to the protection given under the *Insurance Act* to life insurance. If this is the case, the assets in the LIRA issued by the insurance company do not form part of the estate of the deceased planholder and are not subject to the claims of the creditors of the deceased planholder. It will be the pension legislation and regulations, as reflected in the LIRA contract, however, that will determine who receives the LIRA upon death of the planholder. The mere fact that a RRSP is purchased with locked-in pension funds does not mean that the creditor protection afforded to life insurance under the *Insurance Act* does not apply.[94] However, this may all be academic if both the pension legislation and the *Insurance Act* prevent the creditors of the deceased planholder of the LIRA from attaching the funds.

3. Other RRSPs

[32] Under this heading we deal with RRSPs that are not insurance RRSPs, LIRAs or other locked-in RRSPs. We shall refer to these as ordinary RRSPs. It is unclear whether ordinary RRSPs are available for payment of creditors of the

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[91] (...continued)
from execution, seizure or attachment.
(3) Money payable from a prescribed retirement savings arrangement or from a life annuity purchased in accordance with section 42, 43 or 48 of subsection 73(2) is exempt from execution, seizure or attachment.

[92] *Employment Pension Plans Regulation*, *supra* note 32, s. 38.

[93] See "Superintendent's List of Financial Institutions Offering Locked-in Pension Products" found online: <http://www.finance.gov.ab.ca/publications/pensions/index.html>.

[94] In *Tennant v. Tennant* (2002), 62 O.R. (3d) 185 (C.A.), the Ontario Court of Appeal dealt with the issue of creditor protection that was available under the *Insurance Act*, *supra* note 11 for a joint and survivor life annuity purchased for the benefit of a couple after they had divorced. The court reserved any issues concerning the impact of exemption provisions of the *Pension Benefits Act*, *supra* note 91, that may arise. This suggests that the life annuity was purchased with pension benefits.

deceased planholder because there is no clear Alberta authority that determines whether or not such RRSPs remain an asset of the estate after death of the planholder. If the RRSP remains an asset of the estate, it is available for payment of creditors of the deceased planholder. If it passes outside the estate, then it is not available for payment of such debts. The problem arises because of the interplay between wills and estates law and beneficiary designation law. Given the billions of dollars that are held in RRSPs, this uncertainty is undesirable. In this part, the three possible interpretations of Alberta law are discussed. With one exception, the uncertainty exists for all plans as defined in section 47 of the *Trustee Act*,[95] including RRSPs, RRIFs and DPSPs. There is no uncertainty in respect of benefits paid on death under the public sector pensions governed by the *PSPPA* because section 12(3) of the *Public Sector Pension Plans (Legislative Provisions) Regulation*[96] states that such benefits do not form part of the estate of the deceased.

a. Beneficiary designation legislation: section 47 of the Trustee Act

[33] The classic definition of a testamentary disposition is described in *Cock v. Cooke*,[97] as follows:

> . . . whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

This decision was followed by the Supreme Court of Canada in *MacInnes v. MacInnes*[98] wherein the Court held that a beneficiary designation of a deferred profit sharing plan was invalid because it was a testamentary disposition that did not comply with the requirements of the *Wills Act*. Since such designations are testamentary in nature,[99] they will fail if they do not comply with the requirements

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[95] *Supra* note 12.

[96] *Supra* note 73.

[97] (1866), L.R. 1 P. & D. 241 at 243.

[98] [1935] S.C.R. 200.

[99] This is the opinion of most of the jurisprudence, with the notable exception of Ralph E. Scane who argues that not all beneficiary designation are testamentary in nature. Compare Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan Beneficiaries Act* (Report No. 73) (Regina: Manitoba Law Reform Commission, 1990) at 3-6 and Ralph E. Scane, "Non-insurance Beneficiary Designations" (1993) 72 Can. B. Rev. 178. For a more recent discussion, see Anne Werker, "Non-insurance RRSP Designations – Testamentary Dispositions of Property That Do Not Form Part of the Estate?" (2003) 22 E.T.P.J. 102.

of the *Wills Act*.[100] Section 47 was enacted to avoid this result in respect of a 'plan' as defined in that section.[101] The assumption underlying section 47 of the *Trustee Act* is that the designation of a beneficiary of a plan as defined in section 47 is a testamentary disposition.[102]

[34] Section 47 of the *Trustee Act* enables a participant in a plan to designate another person to receive a benefit payable under a plan on the participant's death. It does not, however, apply to a designation of a beneficiary which is governed by the *Insurance Act*.[103] The key definitions for section 47 are as follows:

> 47(1) In this section,
>
> (b) 'participant' means a person who is entitled to designate another person to receive a benefit payable under a plan on the participant's death;
>
> (c) 'plan' means
>
> (i) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement for the benefit of employees, former employees, agents or former agents of an employer or their dependants or beneficiaries, whether created by or pursuant to a statute or otherwise,
>
> (ii) a fund, trust, scheme, contract or arrangement for the payment of an annuity for life or for a fixed or variable term or under which money is paid for the purpose of providing, on the happening of a specified event, for the purchase of, or the payment of, an annuity for life or for a fixed or variable term, created before or after the commencement of this section,
>
> (iii) a registered retirement savings plan or registered retirement income fund as defined in the Income Tax Act (Canada), or
>
> (iv) a fund, trust, scheme, contract or arrangement prescribed in regulations made by the Lieutenant Governor in Council.

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[100] For example see *Kochut v. Kochut*, [1992] A.J. No. 1312 (Q.B.) and *McKeen Estate v. McKeen Estate*, [1992] A.J. No. 1317. Compare with *Re Reese Estate* (1994), 4 E.T.R. (2d) 38 (Alta. Dist. Ct.).

[101] For a more detailed history of the *Trustee Act*, *supra* note 12, s. 47, see ALRI Rep. 68, *supra* note 38 at 21-28.

[102] This is the opinion of most of the jurisprudence, with the notable exception of Ralph E. Scane who argues that not all beneficiary designation are testamentary in nature. Compare MLRC Rep. 73, *supra* note 99 at 3-6 and Scane, *supra* note 99. For a more recent discussion, see Werker, *supra* note 99.

[103] *Trustee Act*, *supra* note 12, s. 47(15).

[35] Section 47 applies to a wide variety of plans including: (a) RRSPs, DPSPs, RRIFs, (b) pension plans, (c) LIRA, LIF and LRIF created by pension legislation, (d) certain retirement compensation arrangements, and (e) life annuities[104] and fixed term annuities. A retirement compensation arrangement is another device recognized by the *Income Tax Act*. Due to the expense of setting up such arrangements they are usually created only for highly paid executives or athletes and begin with a contribution in the millions.[105] The best description of such arrangements is found in the Retirement Compensation Arrangements Guide 2002 published by CCRA at page 2. Certain retirement compensation arrangements operate as individual pension plans that are paid on retirement, although they can also involve payment of moneys on loss of employment or any substantial change in the services the employee provides.

[36] Beneficiary designations are usually found where the person executing the designation has a contract or trust arrangement with another. Under the law of contract, a third party to a contract who receives a benefit under the contract has no right to enforce that benefit by reason of the rule of privity of contract.[106] This problem is overcome by subsection 47(13) which enables the designated beneficiary to enforce payment of the death benefit. Subsection 47(13) reads as follows:

> 47(13) After the death of a participant who has made a designation that is in effect at the time of the participant's death, the person designated may enforce payment of the benefit payable under the plan to the person designated, but the person against whom the payment is sought to be enforced may set up any defence that that person could have set up against the participant or the participant's personal representative.

The section is silent on whether the plan remains available for payment of debts of the deceased planholder, notwithstanding the existence of a beneficiary

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[104] What is now s. 47(1)(c)(ii) was enacted in 1975 at a time when the common law declared that annuities sold by insurance companies were not life insurance. (See *Gray v. Kerslake*, *supra* note 39.) In 1981, Alberta amended the *Insurance Act*, *supra* note 11 to provide that life insurance included life annuities. Since life annuities must be purchased from a life insurance company, designations for life annuities will be governed by the *Insurance Act* and not the *Trustee Act*, *supra* note 12, s. 47. The retention of life annuities in s. 47 of the *Trustee Act* seems to be an anachronism. The better view is that life annuities now fall within the category of life insurance and, therefore, the designation of life annuities is governed by the *Insurance Act*.

[105] Information provided by Craig Jones, lawyer with Felesky Flynn LLP.

[106] For a more detailed discussion on this point, see Scane, *supra* note 99 at 180-81.

designation. As will be discussed later in this report, pension legislation usually provides creditor protection for death benefits payable under the pension.

[37] Section 47 also creates protection for the plan administrator as follows:

> (14) If this section is inconsistent with a plan, this section applies unless
>
> (a) the inconsistency relates to a designation made or proposed to be made after the making of a benefit payment, and
>
> (b) the benefit payment so made would have been different if the designation had been made before the benefit payment was made,
>
> in which case the plan applies.
>
> (15) When a plan requires or permits a designation or revocation of it to be filed with a specified person or body and any benefit is paid under the plan to a beneficiary on the basis of the latest beneficiary so filed, the payment is deemed to be validly made, as against the person required by the plan to make the payment, notwithstanding that
>
> (a) a later designation or revocation of a designation is filed under the plan after the payment was made, or
>
> (b) the person or body is notified, after the payment was made, of an event that had the effect of revoking a designation so filed.

b. Three possible interpretations

[38] All common-law provinces have introduced beneficiary designation legislation that allows an individual to designate a beneficiary of a future income plan by way of instrument or will.[107] These statutes also empower the plan administrator to pay the benefit to the designated beneficiary upon death of the planholder and allow the designated beneficiary to enforce payment of the benefit.[108] British Columbia and Prince Edward Island[109] have also declared that

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[107] See for example: *Trustee Act*, *supra* note 12, s. 47; *Law and Equity Act*, R.S.B.C. 1996, c. 253, ss. 49-51; *Retirement Plan Beneficiaries Act*, R.S.M. 1992, c. 31, ss. 14 and 15; *Retirement Plan Beneficiaries Act*, S.N.B. 1982, c. R-10.21; *Income Tax Savings Plans Act*, R.S.N.L. 1990, c. I-2; *Beneficiaries Designation Act*, R.S.N.S. 1989, c. 36; *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 53; *Designation of Beneficiaries under Benefit Plans Act*, R.S.P.E.I. 1988, c. D-9; *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, ss. 72-75. Most of these statutes deal with pensions, home ownership plans, RRSPs, RRIFs and DPSPs, although the British Columbia legislation does not deal with DPSPs or pensions.

[108] For example, *Trustee Act*, *ibid.*, s. 47(13) provides as follows:

> 47(13) After the death of a participant who has made a designation that is in effect at the time of the participant's death, the person designated may enforce payment of the benefit payable under the plan to the person designated, but the person against whom the payment is sought to be enforced may set up any defence that that person could have set up against the participant or the participant's personal representative.

(continued...)

when a beneficiary is designated, any benefit payable to that beneficiary is not part of the estate of the planholder and is not subject to claims of the creditors of the planholder. The other provinces have been silent on this point, and courts in these jurisdictions have come to different conclusions as to whether a future income plan remains an asset of the estate that is available for payment of debts of the deceased planholder.

[39] The issue of contention is whether the ability of the plan administrator to pay the benefit directly to the designated beneficiary and the ability of the designated beneficiary to enforce payment of the benefit means that the proceeds of the plan vest in the designated beneficiary the moment of death of the planholder. Most of the cases deal with RRSPs but the same issue arises for all 'plans' as defined in section 47 of the Trustee Act, including RRIFs and DPSPs. The law in respect of certain pension benefits is clarified in pension legislation.

[40] In some cases,[110] courts have concluded that the RRSP remains an asset of the estate after the death of the deceased. The reasoning is that future income plans remain an asset of the estate unless there is a statutory exception like that found in

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[109] (...continued)
Most other statutes have wording patterned after the *Succession Law Reform Act*, *supra* note 107, s. 53, which reads as follows:

> 53. Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant,
>
> (a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, in the absence of actual notice of a subsequent designation or revocation made under section 51 but not in accordance with the terms of the plan; and
>
> (b) the person designated may enforce payment of the benefit payable to him under the plan but the person administering the plan may set up any defence that he could have set up against the participant or his or her personal representative.

[110] *Law and Equity Act*, *supra* note 107, ss. 49(2)(c), 50(2)(c) and 51(2)(c); *Designation of Beneficiaries under Benefit Plans Act*, *supra* note 107, s. 9. Note that the P.E.I. legislation deals with pension and employment benefits plus RRSPs, RRIFs and RHOPS, and all these 'plans' pass outside the estate. B.C. has designation legislation for pension benefits as well as RRSPs, RHOPs, and RRIFs, but only the RRSPs, RHOPs and the RRIFs pass outside the estate by virtue of the beneficiary designation legislation. Perhaps the status of pension benefits on death of the employee or former employee is dealt with in the pension legislation of B.C.

[111] See *CIBC v. Besharah* (1989), 68 O.R. (2d) 443 (Ont. H.C.J.), *Waugh Estate v Waugh* (1990), 63 Man. R. (2d) 155 (Q.B.) and *Pozniak Estate v. Pozniak*, [1993] 7 W.W.R. 500 (Man. C.A.).

section 580(1) of the *Insurance Act*[11] for life insurance proceeds. Moreover, the ability of the planholder to designate a beneficiary is immaterial to the question of whether the future income plan remains an asset of the estate.[12] The designated RRSP is categorized as a specific bequest that ranks with other specific bequests, specific devises, and residuary devises in the payment of debts under the marshalling rules. This will be referred to as the *Besharah* approach.

[41] The *Besharah* approach finds support in the unreported decision of Justice Forsyth in *Re Estate of Chamberlain*.[13] In this case, the deceased had designated a beneficiary for her RRSP by instrument. The issue was whether the proceeds of the RRSP were part of the deceased's estate and available to satisfy a claim by a dependant under the *Family Relief Act*.[14] Justice Forsyth noted the difference in wording between section 47(11) of the *Trustee Act*[15] and section 265(1) of the *Insurance Act*[16] and noted that it would take clear language "to sever from the estate moneys which have been part of the deceased's estate up until the moment of his death". He approved of the reasoning in *CIBC v. Besharah*. He concluded that a RRSP with a designation outside a will remains an asset of the estate and should be held by the trustee pending determination of claims under the will of the deceased.

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[11] *Supra* note 11.

[12] *CIBC v. Besharah*, *supra* note 110. It is interesting that subsequent Ontario decisions state that they do not follow *Besharah* because it does not take into account the beneficiary designation legislation found in *Succession Law Reform Act*, *supra* note 107, s. 53. *Besharah* does, however, take into account the beneficiary designation legislation in effect at the time of the decision.

[13] (May 15, 1998) ES-01-087683 (Alta. Surr. Ct.).

[14] R.S.A. 1980, c. F-2. This Act has recently been renamed as the *Dependants Relief Act*, R.S.A. 2000, c. D-10.5.

[15] *Trustee Act*, R.S.A. 1980, c. T-10, s. 47(11) provided as follows:

> 47(11) After the death of a participant who has made a designation that is in effect at the time of his death, the person designated may enforce payment of the benefit payable to him under the plan, but the person against whom the payment is sought to be enforced may set up any defence that he could have set up against the participant or his personal representative.

[16] *Insurance Act*, R.S.A. 1980, c. I-5, s. 265(1) provided as follows:

> 265(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

[42] In other cases,[117] the courts have concluded that the effect of allowing the designated beneficiary to enforce payment of the benefit directly is that the RRSP is not an asset of the estate (unless the designated beneficiary is the estate), but remains available for payment of debts of the deceased.[118] The personal representative must liquidate the assets in the estate and pay creditors; however, the personal representative is under no duty to collect the RRSP. If debts remain unpaid after this process is completed, then the creditors must commence action against the designated beneficiary of the RRSP. These courts amend the marshalling rules without even acknowledging that they are doing so. This is hereafter referred to as the *Clark* approach.

[43] This approach has been criticized on several fronts. The first criticism is that if property to the future income plans vests in the designated beneficiary on death of the planholder, there is no legal authority permitting a creditor to lay claim to it.[119] Furthermore, this approach creates problems in an insolvent estate. Barry Corbin summarized these problems as follows:[120]

> 1. What happens when there are two or more estate creditors with claims which cannot be satisfied out of the assets of the estate? Is it a case of the race going to the swift? Suppose RRSP proceeds of $100,000 have been paid to a named beneficiary and one of the estate creditors with an unsatisfied claim in excess of that sum successfully sues the beneficiary for the full proceeds paid out. Are the other creditors out of luck? Or does the creditor who sued have to share pro rata with the other creditor(s) according to the amounts of their respective claims? Does it matter if one of the estate creditors had taken security and the other(s) had not?

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[117] See *Clark Estate v. Clark*, [1997] 3 W.W.R. 62 (Man. C.A.); *Banting v. Saunders Estate* (2000), 34 E.T.R. (2d) 163 (Ont. Sup. Ct. J.); *Curley v. MacDonald* (2000), 32 E.T.R. (2d) 202 (Ont. Sup. Ct. J.); *Fekete Estate v. Simon* (2000), 32 E.T.R. (2d) 202 (Ont. Sup. Ct. J.).

[118] In *Clark Estate v. Clark*, *ibid.* at para. 31, the Man. C.A. stated:

> In the present case, the addition of ss 14 and 15 to *The Retirement Plan Beneficiaries Act* simply established the mechanism by which the administrator of the RRSP should pay out the moneys. Those provisions did not, however, make those moneys immune from the claims of creditors. Once in the hands of the named beneficiaries, I would hesitate to describe the funds as an 'asset' of the estate. But however they may be described, they are subject to the claims of general creditors of the deceased's estate whose claims cannot be met by the estate itself.

[119] *Amherst Crane Rentals Ltd. v. Perring* (2002), 46 E.T.R. (2d) 1 (Ont. Sup. Ct. J.). But see the criticism of this case in Werker, *supra* note 99.

[120] Barry Corbin, "RRSPs: Partial Protection Against Creditors" (2001) 20 Est. Tr. & Pensions J. 33 at 43-44.

2. Where there are multiple named beneficiaries of a single RRSP or separately named beneficiaries of two or more RRSPs, is there any legal principle which would entitle one of them who is successfully sued to seek contribution and indemnity from the other(s)?

3. Where does the estate creditor stand in relation to the beneficiary's own creditors? Whatever that status, how is it affected if the beneficiary is bankrupt?

[44] The third, and latest approach in Ontario,[121] to this issue is illustrated in *Amherst Crane Rentals Ltd. v. Perring*.[122] In this case, the court refused to follow either the *Besharah* approach or the *Clark* approach and held that by virtue of section 53 and 72(1)(g) of the *Succession Law Reform Act*,[123] a RRSP with a beneficiary designation vests in the designated beneficiary on death and is not an asset of the estate. Section 53 deals with a designated beneficiary's ability to receive payment of the RRSP from the administrator of the plan. Section 72(1) is will substitute[124] protection found in the part of the Act dealing with support of dependants after death of the deceased. The court reasoned that there would be no

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[121] In Ontario, there are three different approaches taken at the trial level on this issue and the Ontario Court of Appeal has yet to address the issue.

[122] *Supra* note 119. See also *Baltzan Estate v. Royal Bank of Canada*, [1990] 3 W.W.R. 374 (Sask. Surr. Ct.) which reached a similar result.

[123] *Supra* note 107. Ss. 53 and 72(1) read as follows:

> 53. Where a participant in a plan has designated a person to receive a benefit under the plan on the death of a participant,
>
> (a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation in accordance with the terms of the plan . . .; and
>
> (b) the person designated may enforce payment of the benefit payable to him under the plan . . .
>
> 72(1) Subject to section 71, for the purpose of this part, the capital value of the following transactions effected by a deceased before his or her death. . . shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his estate, and being available to be charged for the payment of an order . . .:
>
> (g) any amount payable under a designation of a beneficiary under Part III.

[124] There are many ways of ensuring that assets do not form part of the estate of the deceased yet remain within the substantial control of the deceased until death. Collectively these methods are referred to as will substitutes and include: life insurance proceeds payable to a named beneficiary, property held in joint tenancy with a third party, an *inter vivos* trust with income paid to the settler during his or her life, and survivor's benefits payable under a pension to a named beneficiary. For a more detailed discussion of will substitutes see Alberta Law Reform Institute, *Division of Matrimonial Property on Death* (Report No. 83) (Edmonton: Alberta Law Reform Institute, 2000) at 173-77.

purpose served by including RRSP moneys in the will substitute protection if in fact the moneys remained part of the estate. "If a RRSP is part of the estate section 72(1)(g) is meaningless, a result the law abhors." This decision has been appealed to the Ontario Court of Appeal, and the Court heard argument in October 2003. As of March 31, 2004, the Court has not issued the decision. Please note that Alberta has no equivalent to section 72 of the *Succession Law Reform Act*.[126]

c. *Need for clarity*

[45] Given the billions of dollars that are tied up in future income plans, it is important that there be certainty around ownership of future income plans upon death of the planholder. The law must be clear on whether a plan as defined in section 47 of the *Trustee Act*[127] remains an asset of the estate upon death of the planholder even where the planholder has designated a beneficiary by instrument or will. Given that courts have interpreted beneficiary legislation similar to section 47 of the *Trustee Act*[128] in three different ways, it is submitted that Alberta legislation should state that plans either are or are not assets of the estate of the deceased planholder. Such a statement could be included in section 47 of the *Trustee Act*[129] or in legislation dealing with administration of estates. Since the scope of section 47 of the *Trustee Act*[130] is broader than RRSPs, RRIFs and DPSPs, the effect of such a statement in respect of employment pension and retirement benefits must also be considered should section 47 of *Trustee Act*[131] be amended. Recommendations concerning RRSPs, RRIFs, and DPSPs will be made in this report, but a consideration of the other plans in section 47 is beyond the scope of this report.

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[126] *Supra* note 107.

[127] *Supra* note 12.

[128] *Ibid.*

[129] *Ibid.*

[130] *Ibid.*

[131] *Ibid.*

C. Registered Retirement Income Fund

1. Insurance RRIFs

[46] As discussed in the context of RRSPs, section 555 of the *Insurance Act*[11] defines life insurance to include "an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount". Insurance money is defined to include, among other things, annuities payable by an insurer under a life insurance contract. Under a RRIF, the financial institution undertakes to pay a retirement income each year to the planholder of the RRIF commencing not later than the first calendar year after the year in which the plan is established. The minimum amount that must be withdrawn from the RRIF each year is established by section 146.3(1) of the *Income Tax Act*.[12] Periodic payments paid by a life insurance company pursuant to a RRIF constitute insurance money because they are annuities payable to an insured.[13] Therefore, they are protected by section 580(1) of the *Insurance Act*.[14] By virtue of that section, if a beneficiary is designated, the moneys in the RRIF are not part of the estate of the insured and are not subject to the claims of the creditors of the insured. A RRIF paid to the estate of the planholder will form part of the estate and is available for payment of the debts of the deceased planholder.

2. Life income funds and locked-in retirement income fund

a. What are a life income fund and a locked-in retirement income fund?

[47] At one time, the planholder of a LIRA could only use these moneys to purchase a life annuity. This requirement was not favoured by those who wanted to control their own moneys. As a result, starting in 1991, most provinces began introducing retirement income arrangements, known as life income funds, in their

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[11] *Supra* note 11.

[12] *Supra* note 3.

[13] See *Royal Bank of Canada v. North American Life Assurance Co. and Rangotra*, [1996] 1 S.C.R. 325; *British Columbia Enterprise Corp. v. Springall* (1999), 12 C.C.L.I. (3d) 203 (B.C.S.C.); *Bank of Montreal v. Mercer* (2001), 197 Nfld. & P.E.I.R. 290 (S.C. (T.D.)). The *Rangotra* decision is an example of the protection that extends to a RRIF issued by an insurance company but the case itself deals with other issues. The other two decisions deal specifically with whether a RRIF issued by a life insurance company is life insurance. Both of these cases deal with creditor protection during the lifetime of the planholder of the RRIF issued by the insurance company created by legislation that is identical to the *Insurance Act*, *supra* note 11, s. 580(2). However, every insurance contract receives the benefit of both ss. 580(1) and (2).

[14] *Insurance Act*, *ibid.*

pension legislation.[135] Alberta was no exception. The *EPPA*[136] was amended to recognize retirement income arrangements, which include: (1) a life income fund ("LIF"), and (2) a locked-in retirement income fund ("LRIF"). Sections 38 and 39 of the *EPPA*[137] and sections 39, 40, 41 and 58(2) of the *Employment Pension Plans Regulation*[138] permit the transfer of the commuted value of pension benefits to LIFs and LRIFs in certain situations. Section 38 of the *EPPA* deals with the portability of pension benefits if the employment is terminated before retirement age. Section 39 of the *EPPA* deals with pre-retirement death benefits. The *PSPPA*[139] and the regulations for each plan[140] allow for the transfer of the commuted value of pension benefits to a LIRA, but do not allow for transfer to a LIF or LRIF. However, every LIRA allows for the transfer of funds to a LIF or LRIF so public sector pensions moneys can ultimately be deposited into a LIF or LRIF.

[48] LIFs and LRIFs are restricted forms of RRIFs designed to hold locked-in pension funds. Therefore all LIFs and LRIFs are governed by the rules established in the *Income Tax Act*[141] as well as rules established in the *EPPA* and regulations.[142] All money held in a LIF or LRIF must be used to provide or secure a pension that would have been required by the *EPPA* and regulations.[143] To accomplish this, there are restrictions on how the plan funds can be used and the amount that can be withdrawn each year, and there is protection for the surviving pension partner, none of which is the case for ordinary RRIFs. If the financial

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[135] Kirk Polsen and George Brett, *Retire Right: The Practical Guide to RRIFs, Annuities and Pensions* (Toronto: ITP Nelson, 1998) at 137-39.

[136] *Supra* note 58.

[137] *Ibid.*

[138] *Supra* note 32.

[139] *Supra* note 72.

[140] *Public Sector Pension Plans (Legislative Provisions) Regulation*, *supra* note 73.

[141] *Supra* note 3.

[142] The conditions of a LIF are set out in the *Employment Pension Plans Regulation*, *supra* note 32, s. 40 and the conditions of a LRIF are set out in s. 41 of the said regulation.

[143] *Employment Pension Plans Regulation*, *ibid.*, ss. 39(10)(a), 40(3)(a) and 41(3)(a)(i).

institution improperly pays money from a LIF or LRIF, the institution remains liable to pay the money that should have been paid if the error had not been made.[144]

[49] The first feature that distinguishes LIFs and LRIFs from other RRIFs is that the money is locked-in and there are restrictions on the amount of money that can be withdrawn from the plan in any year. The *Income Tax Act* establishes a minimum that must be withdrawn from a RRIF each year, but no maximum. Therefore, the planholder of an ordinary RRIF can withdraw the entire amount in any year if he or she so chooses. In contrast, the planholder of a LIF or LRIF must withdraw an amount that equals or exceeds the minimum established by the *Income Tax Act* but does not exceed the maximum amount established for LIFs and LRIFs in the regulations. The formula used to calculate the maximum yearly withdrawal is different for LIFs than it is for LRIFs.[145] (The other main difference between a LIF and LRIF, is that at age 80 the planholder of a LIF must purchase a life annuity. This is not the case for LRIFs.) Furthermore, funds in a LIF or LRIF, aside from providing periodic payments to the planholder, can be used during the lifetime of planholder only to purchase the following:[146]

(a) another LIF or LRIF,

(b) a life annuity contract subject to certain conditions, or

(c) a LIRA on certain conditions.

[50] The second feature that distinguishes LIFs and LRIFs from other RRIFs is the protection extended to the surviving pension partner by the *EPPA* and regulations. Where the planholder has a surviving pension partner at the time that the balance of a LIF or LRIF is used to purchase a life annuity (and this must

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[144] *Employment Pension Plans Regulation*, *ibid.*, ss. 39(10)(c), 40(3)(a) and 41(3)(a)(ii).

[145] Compare *Employment Pension Plans Regulation*, *ibid.*, ss. 40(3)(b) and 41(3)(c). For a useful comparison of LIFs and LRIFs see Polsen and Brett, *supra* note 135 at c. 28. For a LIF, the maximum yearly withdrawal is calculated using a formula which applies a term-certain-to-age-90 annuity factor to the fund value at the beginning of each year. This ensures that there will be money in the plan when the planholder reaches age 80, so that the plan can be converted to a life annuity at that time. The maximum for a LRIF is the greater of total accumulated income in the LRIF, the preceding year's plan income, and in the year the plan commences and in the following year, 6% of the plan's value.

[146] *Employment Pension Plans Regulation*, *supra* note 32, ss. 40(3)(b) and 41(3)(b).

happen when the planholder of a LIF turns 80[147]), the annuity must be a joint-and-last survivor annuity unless the pension partner waives this benefit.[148] Moreover, should there be funds in the LIF or LRIF upon the death of the planholder, the balance in the fund is to be paid to the surviving pension partner even if there is another designated beneficiary. If there is no surviving pension partner, then the balance in the fund is to be paid to the designated beneficiary, and if there is no valid beneficiary designation, then to the personal representative of the estate of the deceased planholder.[149] In the case of an ordinary RRIF, the balance in the fund upon the death of the planholder will be paid to the designated beneficiary who can be someone other than the pension partner.

b. Creditor protection under the EPPA

[51] Section 85 of the *EPPA*[150] provides that ". . . money that has been transferred under section . . . 38, 39(6) . . . and money earned by such transferred money . . .are exempt from execution, seizure or attachment either at law or in equity . . ." The commuted value of a pension can be transferred to a LIF or LRIF under section 38 and 39(6) and, therefore, such moneys should be exempt from execution or seizure or attachment while the moneys are in the plan. Query whether moneys paid out of such plans are also exempt from seizure. A creditor might argue that a LIF or LRIF remains an asset of the estate, and is therefore subject to claims by creditors, because the *EPPA* does not have a provision similar to section 12(3) of the *Public Sector Pension Plans (Legislative Provisions) Regulation*.[151] This argument is unlikely to succeed given that the surviving pension partner has rights created by the *EPPA* itself which could be viewed as vesting the pre-retirement death benefit in the surviving pension partner and given that such an interpretation would defeat the creditor protection created by section 85 of the *EPPA*.

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[147] *Employment Pension Plans Regulation*, *ibid.*, s. 40(3)(d).

[148] *Employment Pension Plans Regulation*, *ibid.*, ss. 40(3)(e) and 41(3)(a)(ii).

[149] *Employment Pension Plans Regulation*, *ibid.*, ss. 40(3)(f) and 41(3)(a)(ii).

[150] *Supra* note 58.

[151] *Supra* note 73.

Furthermore, it is a prescribed term of every LIF or LRIF contract that the money is exempt from execution, seizure or attachment.[152]

c. *Creditor protection under the Insurance Act*

[52] Several insurance companies are acknowledged by the Superintendent of Pensions to sell LIFs and LRIFs. Since insurance companies can sell these restricted forms of RRIFs, the issue arises whether such LIFs and LRIFs are life insurance that is protected by section 580 of the *Insurance Act*.[153] As discussed above, ordinary RRIFs sold by insurance companies do fall into the category of life insurance and receive the protection of section 580 of the *Insurance Act*. The question is whether LIFs and LRIFs sold by insurance companies will also receive the protection given to life insurance. It seems reasonable to conclude that such protection would be available as long as it does not conflict with the *EPPA* and regulations. However, we have not discovered case law that addresses this issue. Again, this would be academic if both the *EPPA* and the *Insurance Act* prevented creditors of the deceased planholder of the LIF or LRIF from attaching the moneys.

3. Other RRIFs

[53] Under this heading, we consider RRIFs that are not insurance RRSPs, LIFs or LRIFs. We shall refer to these as ordinary RRIFs. It is unclear whether ordinary RRIFs are available for payment of creditors of the deceased planholder because there is no clear Alberta authority that determines whether or not such RRIFs remain an asset of the estate after death of the planholder. The uncertainty arises in situations in which the planholder has designated a beneficiary of the RRIF other than the planholder's estate. If the RRIF remains an asset of the estate, it is available for payment of creditors of the deceased planholder. If it passes outside the estate and vests in the designated beneficiary, then it is not available for payment of such debts. A RRIF falls with the definition of 'plan' set out in section 47 of the *Trustee Act*.[154] As with RRSPs, the issue will be determined by the interpretation a court places on section 47. There is no Alberta case on point, but

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[152] *Employment Pension Plans Regulation*, *supra* note 32, ss. 39(10)(c), 40(3)(d) and 41(3)(a)(i).

[153] *Supra* note 11.

[154] *Supra* note 12.

courts in other jurisdictions have come up with three different interpretations of similar legislation. The cases considered on this topic in the context of RRSPs and the uncertainty they create are equally applicable to RRIFs. We refer you to that discussion.

D. Deferred Profit Sharing Savings Plans

[54] As discussed in Chapter 1, DPSPs are frequently used as a retirement income vehicle by themselves or in combination with a registered pension plan. DPSPs are not subject to regulation under pension legislation[155] and are not contracts of life insurance under the *Insurance Act*.[156] Therefore, neither the pension legislation nor the *Insurance Act*[157] exempts moneys payable under a DPSPs from seizure, execution or attachment by creditors of the employee during the lifetime of the employee or upon death.[158] (Where, however, the amounts vested in an employee under the DPSP are used for the purchase of an annuity from a life insurance company, the annuity would be life insurance and subject to the protection created section 580(1) and (2) of the *Insurance Act*.[159]) Moreover, there is no exemption for such an asset presently found in the *Civil Enforcement Act*.[160] Therefore, it is likely that moneys owing under a DPSP to an employee could be attached by creditors of the employee.[161]

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[155] See *Employment Pension Plan Regulations*, *supra* note 32, s. 1(5)(a); *Pension Benefits Standards Act, 1985*, *supra* note 32, s. 4(2)(a).

[156] *Supra* note 11.

[157] *Ibid.*

[158] *Re Rogers* (1993), 18 C.B.R. (3d) 239 (N.S.S.C. (T.D.) in Bankruptcy). This was a case in which the employment of the bankrupt had been terminated and benefits owed under the DPSP by reason of the termination of employment. All DPSPs require payment of the amounts vested in the employee under the DPSP within 90 days of termination of employment. See *Income Tax Act*, *supra* note 3, s. 147(20)(k). The creditor, however, can be in no better position than the employee. If the employment is not terminated and the plan does not allow for withdrawal during employment, no moneys will be payable under the DPSP until the earlier of retirement, termination of the employment or when the employee turns 69 years of age.

[159] *Supra* note 11.

[160] R.S.A. 2000, c. C-15. Exemptions are dealt with in Part 10 of this Act.

[161] We can find only one case dealing with this issue. See *Re Rogers*, *supra* note 158.

[55] Upon death of the employee, the amounts that have vested in the employee are to be paid to the person designated by the employee to receive this amount, or the employee's estate. The plan may give the designated beneficiary the right to elect to receive the payment in equal installments payable over a period not exceeding 10 years, or to have the trustee of the DPSP use the moneys to purchase an annuity for the beneficiary. Payment of the annuity must begin by the end of the year in which the beneficiary turns 69 and the guaranteed term of the annuity cannot exceed 15 years.

[56] What is unclear is whether the amounts that are vested in the employee at the time of death remain an asset of the estate of the deceased employee. If they remain an asset of the estate, the claim of the creditors of the deceased employee will take priority to that of the designated beneficiary. If the money becomes the property of the designated beneficiary, then they are not available for payment of the creditors of the deceased employee. Creditors of the employee will rely on *MacInnes v. MacInnes*[102] in which the Supreme Court of Canada held that the designation of a beneficiary of a profit sharing fund was a testamentary disposition. It follows that if the designation is a testamentary disposition, the benefit must be a testamentary asset that is available for payment of creditors of the deceased employee, unless a statute provides otherwise. Therefore, creditors will argue that the moneys payable under a DPSP remain an asset of the estate of the deceased employee because there is no legislation similar to that found in section 580(1) of the *Insurance Act*[103] and certain pension legislation that says that the money "is not part of the estate of the [employee] and is not subject to the claims of the creditors of the [employee]". The creditor will also rely on the line of cases that find that legislation similar to section 47 of the *Trustee Act*[104] is insufficient to remove the asset from the estate.

[57] The designated beneficiary will raise two arguments in support of the conclusion that the moneys are not part of the estate of the deceased employee.

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[102] *Supra* note 98.

[103] *Supra* note 11.

[104] *Supra* note 12.

The first argument is based on the *Income Tax Act*.[165] Section 147(2) sets out the condition that must be included in a DPSP that is to be registered with CCRA. One of those conditions is the requirement that moneys vested in the employee become payable to another person designated by the employee or to the employee's estate within 90 days of death of the employee. In turn, this money is taxed in the hands of the designated beneficiary, and not the estate of the deceased employee.[166] This coincides with the asset passing to the designated beneficiary, and not the estate of the deceased employee. The second argument arises from the fact that a DPSP is a plan within the meaning of section 47 of the *Trustee Act*.[167] Whenever there is a designated beneficiary of such a plan, the argument can be made that the effect of section 47 of the *Trustee Act*[168] is to vest the property in the designated beneficiary and to remove the property from the estate of the deceased planholder. Courts have reached three different conclusions in interpreting beneficiary designation legislation as it applies to RRSPs. One line of cases held that the plan remains an asset of the estate and is available for payment of debts. The second line of cases held that the plan remains an asset of the estate but is the last asset to be used to pay the debts of the deceased planholder. The third line of cases held that the plan was not an asset of the estate and, therefore, was not available to satisfy debts of the deceased planholder. The designated beneficiary will rely on the second and third line of cases. See the earlier discussion of these three lines of cases under the heading of RRSPs. The uncertainty in the law created by these three lines of cases applies equally to RRSPs, RRIFs and DPSPs.

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[165] *Supra* note 3.

[166] *Ibid*., ss. 56(1)(i) and 147(10).

[167] *Supra* note 12.

[168] *Ibid*.

CHAPTER 3. SHOULD RRSPS, RRIFS AND DPSPS BE PROTECTED FROM CREDITORS OF THE DECEASED PLANHOLDER?

A. Introduction

[58] In Report No. 91, *Exemption of Future Income Plans*, we recommended that insurance and non-insurance RRSPs, DPSPs and RRIFs as defined in the *Income Tax Act*, and obligations to pay money out of such plans, should be totally exempt from enforcement processes during the lifetime of the planholder. Enforcement processes includes all writ proceedings, attachment orders under Part 3 of the *Civil Enforcement Act* and all other pre-judgment and post-judgment remedies of a creditor which could result in a money judgment. The exemption will not apply, however, to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plan, assuming such a security to be permitted by law. The exemption would exist if there was or was not a beneficiary designation for the plan. In our opinion, these assets are so similar to pensions and so essential to the financial security of individuals that they should be completely protected from creditors.

[59] In this chapter, we examine whether similar creditor protection should continue after death of the planholder, and if so, in what circumstances. We conclude that creditor protection is needed, and we outline the options for reform and then make recommendations that will apply in the context of death of the planholder. These recommendations are influenced by the need for creditor protection and the realities of estate administration. We approach these issues from first principles, and note that our recommendations are made on the basis that they would replace section 92 of the *Civil Enforcement Act*[107] in respect of exemptions for RRSPs, RRIFs and DPSPs. In our opinion, Section 92, combined with the

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[107] *Civil Enforcement Act*, *supra* note 160, s. 92 reads as follows:

92(1) Where a debtor is deceased, the property of that debtor that would be exempt if the debtor were alive remains exempt from writ proceedings against the debtor's estate for the period of time that the property is required for the maintenance and support of the deceased debtor's dependants.

(2) For the purposes of section 90, if the debtor has died, the representative of the debtor's estate may make a selection of the property to be exempt.

proposed exemptions during the lifetime of the planholder, would provide inadequate protection in the context of death of the planholder.[170]

[60] Our recommendations will affect all RRSPs, RRIFs and DPSPs, including such plans sold by insurance companies, and including LIRAs, LIFs and LRIFs that are also governed by pension legislation. A brief discussion of the taxation of RRSPs, RRIFs and DPSPs on death of the planholder is included in this chapter because the taxation of such plans causes problems for the administration of the estate, which in turn, influence our final recommendations.

B. Taxation of RRSPs, RRIFs and DPSPs Upon Death of Planholder

[61] In this part, we examine the taxation of RRSPs, RRIFs and DPSPs. This is a general discussion of a very technical area and we refer you to the many CCRA publications that discuss this topic.

1. Taxation of RRSPs upon death of planholder

a. Unmatured RRSPs

[62] The taxation of a RRSP upon death of the planholder depends upon whether the plan was matured or unmatured on the date of death.[171] A matured RRSP[172] is

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[170] The creditor protection extended by the *Civil Enforcement Act*, *ibid.*, s. 92 has some severe limits, which include the following:

(a) The protection applies only if enforcement creditors exist: *Re Ferguson* (1957) 11 D.L.R. (2d) 725 (Alta. S.C.). Therefore, when none of the creditors of the deceased have obtained a judgment against the deceased debtor, the exemptions have no application in the administration of the estate and the creditors are not inhibited by the exemptions. A similar result will be reached in the interpretation of section 92 of the *Civil Enforcement Act*. Section 1 of that Act defines writ proceedings as 'any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment'. A creditor who has not obtained a money judgment can still rely on *Re Ferguson* as authority that section 92 has no application where the deceased debtor had debts but no enforcement creditors.

(b) The protection could be lost if an Alberta court finds *Crichton v. Zelenitsky* [1946] 3 D.L.R. 729 (Man. C.A.) persuasive and interprets the provision as not applying vis-à-vis the personal representative.

(c) Basing the exemption on need for 'maintenance and support' is problematic both in establishing the need and determining how long the need lasts.

(d) It is unclear whether the exempt assets referred to in section 92 of the CEA are exempt from payment of funeral and testamentary expenses. The distinction between: (1) debts and (2) funeral and testamentary expenses is problematic.

[171] For a useful discussion on this point see IT-500R: RRSPs – Death of an Annuitant and Legal Education Society of Alberta, *Alberta Estate Administration* (Edmonton, Legal Education Society of

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one in which payment of a retirement income has commenced. The retirement income must be in the form of an annuity payment.[173] If the planholder dies before the plan matures, the deceased planholder is deemed to receive, immediately before death, an amount equal to the fair market value of the property held in the unmatured RRSP at the time of death.[174] This amount has to be reported as income in the terminal return of the deceased planholder even if the moneys in the plan are paid to a designated beneficiary. The designated beneficiary will not have to declare the moneys received as income or pay any tax on the moneys if the moneys were declared as income of the deceased planholder.[175] This creates the unusual situation of the estate of the deceased planholder having the tax liability and the designated beneficiary having the asset.

[63] There are two exceptions to this general rule for taxation of an unmatured plan. First, the income of the deceased planholder does not include any refund of premiums[176] paid to a spouse,[177] common-law partner or dependent child or grandchild. The refund of premiums will be taxed in the hands of the recipient, unless the recipient takes appropriate steps to defer payment of tax on the assets.[178] A refund of premiums for an unmatured plan is any amount paid to a spouse or common-law partner or any amount paid to a child or grandchild who was, at the time of death, financially dependent on the planholder for support. It is assumed, unless the contrary can be established, that a child or grandchild was not

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[173] (...continued)
Alberta, 1999) c. 11; Taxation [LESA: *Alberta Estate Administration*].

[174] See definition of 'maturity' in the *Income Tax Act*, *supra* note 3, s. 146(1).

[175] See definition of 'retirement income' in the *Income Tax Act*, *ibid.*, s. 146(1).

[176] *Income Tax Act*, *ibid.*, s. 146(8.8) and (8.9).

[177] RC4177 (E) Rev.02: Death of a RRSP Annuitant, p. 1.

[178] "Refund of premiums" is a term defined in the *Income Tax Act*, *supra* note 3, s. 146(1).

[179] IT-500R: RRSP – Death of an Annuitant, para. 17 makes it clear that '[i]n the case of an amount paid to the spouse, only an amount paid out of a RRSP **before its maturity** and as a consequence of the death of the annuitant qualifies as a refund of premiums. (An amount paid as a consequence of the annuitant's death includes payments made by way of transfers or distributions of property).'

[180] *Income Tax Act*, *supra* note 3, s. 60(l). S. 60(l) of the *Income Tax Act* permits a qualifying beneficiary who receives a refund of premium from a RRSP to defer payment of tax on all or part of the receipt. See the detailed discussion in IT-500R: RRSP-Death of an Annuitant, paras. 27 and 28.

financially dependent on the planholder for support as of the date of death if the child's income for the year before death exceeded the basic personal deduction. However, this is always a question of fact, and there can be situations in which the child is still supported by the planholder even when the child's income in the previous year exceeded the threshold.[179] Second, an election can be made by the personal representative and the surviving spouse or common-law partner of the deceased planholder so that moneys in the RRSP paid to the estate and ultimately received by the surviving spouse or common-law partner are deemed to be a refund of premiums, if this would have been the case had they been paid directly to the surviving spouse or common-law partner.[180] If the election is made, the amount declared to be a refund of premiums is not included in the income of the deceased planholder.

b. Matured RRSPs

[64] Where the planholder dies after maturity of the RRSP, the deceased planholder is deemed to have received, immediately before death, an amount equal to the fair market value of all remaining annuity payments under the RRSP at the time of death.[181] This amount along with the annuity payments received during the year of death must be declared as income of the deceased planholder in the terminal return. A beneficiary of the RRSP will not have to pay tax on any moneys paid from the matured RRSP if the payment was declared as income of the deceased planholder. Again a situation can arise in which the estate of the deceased planholder has the tax liability triggered by the plan but the designated beneficiary has the assets.

[65] There are three exceptions to this general rule of taxation of matured RRSPs. First, if under the terms of the plan the surviving spouse or common-law partner becomes the successor annuitant,[182] no amount is included in the deceased

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[179] For a good discussion on this point, see CCRA, 2001 RRSP Consultation Session at p. 6 under heading: e) Determination of "financially dependent".

[180] *Income Tax Act*, *supra* note 3, s. 146 (8.1).

[181] *Income Tax Act*, *ibid.*, s. 146 (8.8) and RC4177(e) Rev. 02: Death of a RRSP Annuitant at 2-3.

[182] The T4RSP and T4RIF Guide at p. 16 states: "If the spouse or common-law partner of a deceased annuitant is the beneficiary or the successor annuitant under the terms of a matured RRSP, he or she

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planholder's income. Instead, the surviving spouse or common-law partner is taxed on the payments as they are received. The surviving spouse or common-law partner also has the option of rolling the amount of the matured plan into a RRSP, a RRIF or a guaranteed annuity to age 90.[183] Second, should the RRSP be paid to the estate,[184] a rollover to the spouse or common-law partner can still be achieved if the spouse or common-law partner is the beneficiary of the estate entitled to the RRSP.[185] The spouse or common-law partner and the legal representative of the estate must make a joint election that the surviving spouse or common-law partner be the successor annuitant under the plan. If this election is made, payments of the annuity received by the surviving spouse or common-law partner will be declared as their income in the year it is received. Third, any refund of premiums[186] received by a child or grandchild of the deceased planholder who was financially dependent upon the planholder at the time of death can be deducted from the income of the deceased planholder.[187] The child or grandchild will pay tax on the refund of premiums unless steps are taken to defer payment.[188]

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[182] (...continued)
becomes the annuitant of the RRSP."

[183] *Income Tax Act*, *supra* note 3, s. 60(l) and 146(16).

[184] This happens when the planholder designates the estate as the beneficiary, or where there is no valid beneficiary designation. *Insurance Act*, *supra* note 11, s. 574(3) provides that a designation in favour of the "heirs", "next of kin" or "estate" of the insured, or the use of words of similar meaning in a designation, is deemed to be a designation of the personal representative of the insured.

[185] *Income Tax Act*, *supra* note 3, s. 146(8.91).

[186] In the case of an amount paid to the spouse from a RRSP, only an amount paid out of a RRSP before its maturity and as a consequence of death of the planholder qualifies as a refund of premiums. An amount paid as a consequence of death includes payments made by way or transfers or distributions of property. See definition of 'refund of premiums' in the *Income Tax Act*, *supra* note 3, s. 146(1) and IT-500R: RRSPs – Death of an Annuitant at para 17.

[187] *Income Tax Act*, *ibid.*, s. 146(8.9).

[188] *Income Tax Act*, *ibid.*, s. 60(l). These steps are described in IT-500R: RRSPs – Death of an Annuitant at para. 27 and 28. S. 60(l) of the *Income Tax Act* permits a qualifying beneficiary who receives a refund of premiums from a RRSP to defer the payment of tax on all or part of the receipt. The treatment of children and grandchildren has varied over time. A qualified beneficiary includes the following persons:

- The deceased annuitant's spouse or common-law partner;
- For deaths that occur after 1998, a financially dependent child or grandchild of the deceased annuitant, even if the annuitant had a spouse or common-law partner at the time of death;
- For deaths that occurred from 1993 to 1998, a financially dependent child or grandchild of the

(continued...)

2. Taxation of RRIFs on death of planholder

[66] When the owner of a RRIF dies, he or she is deemed to have received, immediately before death, an amount equal to the fair market value of all of the property held in the RRIF at the time of death. This amount plus any income paid to the owner in the year of death must be declared as income of the deceased owner in the terminal return.[189] A beneficiary of the RRIF will not have to pay tax on any payment made out of the RRIF, if the deceased declared the value of the RRIF as income in the terminal return. This creates the situation of the estate of the deceased planholder having the tax liability and the designated beneficiary having the asset.

[67] There are several situations in which the deceased planholder does not have to declare the fair market value of the RRIF as income in the terminal return.[190] The first situation arises where the RRIF contract names the deceased's spouse or common-law partner as the successor annuitant of the RRIF.[191] If such a designation is made, the RRIF continues and the spouse or common-law partner will receive payments out of the RRIF after death and will declare these payments as income in the year they are received. The second situation involves a permitted election.[192] If the deceased did not make such a designation, the spouse or common-law partner can still be considered as the successor annuitant if the legal representative of the deceased consents to the designation and the RRIF carrier agrees. The other situations involve a receipt by a qualified beneficiary[193] of a

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[185] (...continued)
deceased annuitant, if the annuitant had no spouse at the time of death; and
- For deaths that occurred from 1996 to 1998, a financially dependent child or grandchild of the deceased annuitant, even if the annuitant had a spouse at the time of death, if an election is filed to treat the child or grandchild as a qualified beneficiary. See explanatory notes to T2019: Death of a RRSP Annuitant – Refund of Premiums.

[189] *Income Tax Act*, *ibid.*, s. 146.3(6).

[190] *Income Tax Act*, *ibid.*, s. 146.3(6.2).

[191] *Income Tax Act*, *ibid.*, s. 146.3(6).

[192] *Income Tax Act*, *ibid.*, s. 146.3(6.1).

[193] See previous discussion of qualified beneficiary in *supra* note 188. This term includes a spouse, common-law partner or a child or grandchild who is financially dependent upon the deceased at the time of death.

designated benefit.[194] A designated benefit is taxed in the hands of the beneficiary unless the beneficiary takes steps to defer payment of tax.[195] A designated benefit is a payment from a RRIF that would have been a refund of premiums if the fund were an unmatured RRSP at the time of death. Essentially, refunds of premiums and designated benefits receive similar taxation treatment.[196]

3. Tax liability primary responsibility of estate of deceased planholder

[68] The legal representative of a deceased taxpayer is jointly and severally liable with the taxpayer to pay income tax owing by the taxpayer to the extent the legal representative is in possession or control of the property that belongs to the taxpayer's estate.[197] Therefore, the legal representative of the deceased planholder must ensure that all income tax is paid from the assets that constitute the estate. Special rules govern which assets are used first to pay debts of the deceased.[198] The personal property passing by way of residue will be the first class of assets used to pay debts, including any income tax that is due. If this class of assets is insufficient to pay the debts, then other estate assets will be used.

[69] To make doubly sure that the tax triggered by a RRSP or RRIF is paid upon the death of the depositor, section 160.2 of the *Income Tax Act* makes a recipient who is not the spouse or common-law partner of the deceased depositor, jointly and severally liable in respect of the income tax triggered by the RRSP or RRIF. (As already discussed, separate provisions deal with the tax treatment when the beneficiary is the spouse or common-law partner of the depositor.) For example, assume the sister is the designated beneficiary of the deceased's RRSP. By virtue of section 160.2(1), the sister is jointly and severally liable to pay a part of the deceased's tax owing for the year of death equal to the difference between (1) tax payable if value of RRSP at date of death is included as income of the deceased,

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[194] *Income Tax Act*, *supra* note 3, s. 146.3(6.2).

[195] See *Income Tax Act*, *ibid.*, s. 60(l) and RC 4178(E) Rev. 02: Death of a RRIF Annuitant.

[196] LESA: *Alberta Estate Administration*, *supra* note 171 at 11-23.

[197] *Income Tax Act*, *supra* note 3, s. 159.

[198] For a detailed discussion of this area of the law, see Alberta Law Reform Institute, *Order of Application of Assets in Satisfaction of Debts and Liabilities* (Report for Discussion No. 19) (Edmonton: Alberta Law Reform Institute, 2001).

and (2) tax payable if value of RRSP at death is not included in the income of the deceased.[199] Should several beneficiaries be designated for the RRSP, then each beneficiary is jointly and severally liable to pay a proportion of this amount based on the percentage of the RRSP that they received. So if the sister received 50% of RRSP proceeds, then she is liable for 50% of the increased income tax owing by the deceased depositor by reason of the RRSP. Similar rules relate to amounts received out of or under a RRIF.[200] A payment of income tax on behalf of the deceased only discharges the designated beneficiary's liability to the extent that the payment operates to reduce the deceased's liability to an amount less than the amount in which the designated beneficiary was liable by virtue of subsections 160.2(1) and 160.2(2).

[70] Should the designated beneficiary of the RRSP or RRIF not be a qualified beneficiary for the purposes of the *Income Tax Act*,[201] the moneys paid from the plan to the beneficiary are not taxable income in the hands of the beneficiary because that amount is declared as income of the deceased. Therefore, section 160.2 is the device used to make sure that the beneficiary is still liable for a portion of the income tax payable by the deceased in respect of the RRSP and RRIF. In those provinces in which RRSPs and RRIFs do not form part of the estate of the deceased, this section would ensure that the income tax is paid even if the estate has insufficient assets to pay that tax. In provinces where the RRSPs and RRIFs form part of the estate, it probably has less significance but provides another means of ensuring payment of the income tax triggered by the RRSP and RRIF. However, notwithstanding section 160.2 of the *Income Tax Act*, the primary liability for payment of taxes triggered by a RRSP or RRIF upon death of planholder falls on the personal representative.[202] Therefore, it is only if the estate

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[199] *Income Tax Act*, *supra* note 3, s. 160.2(1). The terminology used in the section is more complicated than the above description, but this is the general idea underlying this subsection.

[200] *Income Tax Act*, *ibid.*, s. 160.2(2).

[201] See discussion of qualified beneficiary in *supra* note 188.

[202] *Slater v. Klassen Estate*, [2000] 3 W.W.R. 433 (Man. Q.B.); *Banting v. Saunders Estate*, *supra* note 117.

is insufficient to pay the income tax that the beneficiary of the RRSP or RRIF can be called upon to pay the tax under section 160.2 of the *Income Tax Act*.[203]

[71] Section 153 of the *Income Tax Act* deals with the withholding of income tax by persons making various payments. The list is extensive, but does not catch payments of a RRSP or RRIF to a named beneficiary upon the death of the owner of the plan.[204]

[72] As the case law reveals, the present scheme of taxation creates unpleasant surprises for those who are not intimately familiar with the rules relating to taxation of RRSPs and RRIFs. The problem is compounded by two factors. First, there is no withholding of tax by the plan administrator prior to payment of the moneys to someone who is not a qualified beneficiary under the *Income Tax Act*. Second, the law is uncertain whether the existence of a beneficiary designation for a RRSP or RRIF results in the assets passing outside the estate. The average person often assumes that the RRSP or RRIF moneys will be used to pay the income tax triggered by the plan. This is clearly not the case, and can lead to bizarre results.

[73] *Banting v. Saunders Estate*[205] is a good example of the problems caused by the present taxation rules. In this case, Christine Saunders died leaving a will in which she gave shares in a land holding company to Mr. Banting and the residue of her estate to her five children in equal shares. The will specifically directed that the gift to Mr. Banting should not be affected by any debts of the estate. At the time of her death, the deceased had assets worth $1,068,700 consisting of shares in the land holding company worth $362,000, other property worth $164,700, and RRIFs and RRSPs together worth $542,000. Mrs. Saunders had designated her five children as the beneficiaries of the plans. The issue arose as to who was responsible for payment of the income tax and penalties of $323,000 triggered by the plans. The court held that the RRIFs and RRSPs were not assets of the estate

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[203] *Banting v. Saunders Estate*, *ibid*. This is a case in which the court held that the RRSPs and RRIFs were not part of the estate of the deceased planholder.

[204] This is the industry practice notwithstanding the recent decision to the contrary in *Slater v. Klassen Estate*, *supra* note 202.

[205] *Supra* note 117.

and that the primary obligation for payment of the tax liability fell on the estate. It is only if all of the estate assets, including the shares that were gifted to Mr. Banting, are insufficient to pay the debts that the beneficiaries of the RRSPs and RRIFs may be called upon under section 160.2 of the *Income Tax Act* to contribute to payment of the income tax. In this case the intention of the testator was clear that Mr. Banting was to get the shares and the other assets were to be used to pay the debts. However, the result is contrary to that clear expression of intention because the shares would have to be sold to pay the income tax and other debts.

[74] In our opinion, the present taxation rules for RRIFs and RRSPs cause difficulties in the administration of estates. These difficulties could be mitigated if the *Income Tax Act* required the withholding of tax by the plan administrator whenever moneys are paid to a person who is not a qualified beneficiary under the *Income Tax Act*. Going even further, these problems could be eliminated if RRSPs and RRSPs were taxed in the hands of the designated beneficiary, and not the estate. It is our suggestion that CCRA review this area and the problems it is causing in the administration of estates.

4. Taxation of DPSPs upon death of the planholder

[75] The rules involving DPSPs are complex and will not be dealt with in any detail in this report. For our purposes it is sufficient to understand the following. Section 147(2) of the *Income Tax Act* sets out the conditions that must be met before the Minister will accept for registration a profit sharing plan. It is a requirement under s. 147(2)(k) that the plan provide that all amounts vested under the plan in the employee[59] become payable to the employee, or in the event of the employee's death, to another person designated by the employee or to the employee's estate upon certain dates set out in the subsection. The general rule is that any payment out of the plan is treated as income of the employee or other recipient who receives the money.[60] A payment made to a designated third party (and not the estate of the deceased employee) is, subject to certain exceptions,

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[59] *Supra* note 3, s. 147(2)(k) refers to the employee as the beneficiary. To avoid confusion with a designated beneficiary, we use the term employee instead of "beneficiary" in the discussion of s. 147(2)(k) of the *Income Tax Act*.

[60] *Income Tax Act*, *ibid*., s. 147(10) and I.T.S.A., *Alberta Estate Administration*, *supra* note 171 at 11-25 to 11-25

taxed as income in the hands of the third party.[208] The main exception is that a lump sum payment from the DPSP made to the surviving spouse or common-law partner of the deceased employee that is transferred for the benefit of that individual directly to a registered pension plan, RRSP, or other DPSP is not treated as income of that individual.[209]

C. Need for Creditor Protection Following the Death of the Planholder

[76] This discussion will build on what we have said in Report No. 91, *Exemption of Future Income Plans*, and we refer readers to the more detailed discussion found in Chapters 2 and 3 of that report.

[77] It has long been Canadian public policy to encourage people to save for their retirement and to rely on private resources instead of public pensions. The *Income Tax Act* provides generous tax benefits to people who participate in pensions, RRSPs, RRIFs and DPSPs, as well as for the surviving spouse or common-law partner, or financially dependent child or grandchild of such a person. Alberta has pension legislation which exempts pension benefits from execution and garnishment, both during the lifetime of the employee and upon death of the employee or former employee. These exemptions extend to benefits received under the pension plan by the surviving pension partner, or if there is no surviving pension partner, to the designated beneficiary. The pension legislation also creates rights for the surviving pension partner that supersede any beneficiary designation. RRSPs and RRIFs sold by insurance companies do not form part of the estate of the deceased planholder and are not available for payment of the debts of the deceased planholder. This public policy guards against poverty in old age both for the employee and his or her dependants.

[78] RRSPs and RRIFs for the self-employed are the equivalent of pension plans for employees. DPSPs are also retirement vehicles that are used to provide retirement income to employees. Given that RRSPs, RRIFs and DPSPs are

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[208] *Income Tax Act*, *ibid.*, s. 147(10).

[209] *Income Tax Act*, *ibid.*, s. 147(19) and (20). In situations involving death of the employee, s. 147(19)(b)(ii) restricts such a transfer to surviving spouse or common-law partner. Other designated beneficiaries must pay the tax on the entire lump sum and do not have the ability to transfer it directly to a registered pension plan, RRSP or DPSP.

retirement vehicles that serve the same purpose as pensions, they are deserving of creditor protection similar to that extended to pension plans, and this protection should exist both during the lifetime of the employee and upon death of the employee. Furthermore, all RRSPs and RRIFs should receive such protection and it should not be dependent upon whether they were sold by insurance companies or were purchased with pension funds. There is no practical difference among ordinary RRSPs, insurance RRSPs and LIRAs that would justify different treatment, and no respondent to our Consultation Memorandum No. 11 suggested otherwise. All RRSPs, including LIRAs and insurance RRSPs, are retirement vehicles that serve the same purpose. In our opinion, the differential treatment of RRSPs, RRIFs and DPSPS as set out in Chapter 2 is incoherent and indefensible. The guiding principles should be that, subject to limited exceptions, all RRSPs, RRIFS and DPSPs (including LIRAs, LIFs, LRIFs and insurance RRSPs and RRIFs) should be shielded from attachment by creditors of the deceased planholder.

[79] In the balance of this chapter, we examine the various ways such protection can be created in the context of death of the planholder and where the protection should be created.

D. Recommendations for Reform

1. Law in other provinces

[80] Prince Edward Island and British Columbia have legislation the effect of which is that creditors of the deceased planholder cannot attach a RRSP, RRIF or DPSP if there is a designated beneficiary of the plan. Section 9 of the *Designation of Beneficiaries Under Benefit Plans Act*[209] of Prince Edward Island provides as follows:

> 9. Where a beneficiary[210] is designated, any benefit payable to the beneficiary is not, from the time of the happening of the event upon which it

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[209] *Supra* note 107.

[210] *Ibid.*, s. 9 is patterned after legislation similar to the *Insurance Act*, *supra* note 11, s. 580(1). For the purposes of s. 580, "beneficiary" is defined (in s. 554) as follows:

> "beneficiary" means a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration;

There is no such definition in the P.E.I. Act but it must be inferred that beneficiary is someone other than the estate of the deceased participant.

> becomes payable, part of the estate of the participant, and is not subject to claims of the creditors of the participant.

Section 9 applies to all plans that are governed by the Act, which include pensions, profit-sharing arrangements, RRSPs, RRIFs and registered home owners savings plans.[212] The British Columbia legislation is similar, but not identical, to that of Prince Edward Island. The *Law and Equity Act* has separate provisions dealing with beneficiary designations of pensions, RRSPs, registered home ownership plans and RRIFs. Section 46 deals with beneficiary designations under employee benefit plans, but that section does not address the ownership of the benefit upon the death of the employee. Sections 49 to 51 deal with beneficiary designations for RRSPs, registered home ownership savings plans and RRIFs. These three sections indicate whether the benefit paid on death is or is not part of the estate of the deceased planholder. By virtue of section 49 of the *Law and Equity Act*,[213] if an annuitant designates a person to receive a benefit payable under a RRSP in the event of the annuitant's death, the benefit is not part of the estate of the annuitant. Similar protection is given by section 51 in respect of a RRIF. However, in the case of a registered home ownership savings plan, the protection exists only if the deceased planholder designated a spouse to receive the benefit on death. It follows that if the benefit is not part of the estate of the annuitant, then it is not available for satisfaction of claims of creditors of the deceased annuitant. Of course, should the planholder have designated his or her estate as the beneficiary, or if there is no valid designation and the plan provides that the moneys will be paid to the estate, then the money from the RRSP, RRIF or DPSP would be available for payment of the deceased's creditors in both Prince Edward Island and British Columbia.

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[212] *Designation of Beneficiaries Under Benefit Plans Act*, *ibid.*, s. 1 defines "plan" as follows:

> 1. In this Act,
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> (d) "plan" means
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> (i) a pension, retirement, welfare or profit-sharing fund, trust, schemes, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents, or former agents of an employer or their dependants or beneficiaries, or
>
> (ii) a fund, trust, scheme, contract, or arrangement for the payment of a periodic sum for life or for a fixed or variable term,
>
> and includes a retirement savings plan, home ownership savings plan and a retirement income fund as defined in the *Income Tax Act* (Canada).

[213] *Supra* note 107.

[81] The other common-law provinces do not have legislative provisions that specifically exempt RRSPs, RRIFs or DPSPs from attachment by creditors of the deceased planholder or that deal with the issue of whether those assets pass outside the estate. In those provinces, the issue is determined on the basis of whether the assets do or do not remain an asset of the estate of the deceased planholder, and this depends upon the interpretation placed on the beneficiary legislation of each province. This body of case law was discussed in detail in Chapter 2.

2. Models for reform

[82] In this part, we examine the various models that could be used to protect RRSPs, RRIFs and DPSPs upon the death of the planholder.

a. Model 1: RRSPs, RRIFs and DPSPs pass outside the estate to all designated beneficiaries

[83] One method of ensuring that a RRSP, RRIF or DPSP is not available for payment of the creditors of the deceased planholder is to legislate that benefits paid under such plans upon death of the planholder do not form part of the estate of the deceased and are not available for payment of debts if the planholder had validly designated a beneficiary of the plan. So whenever the planholder has validly designated a beneficiary who is someone other than the estate, the RRSP or RRIF or DPSP will not be available for payment of debts of the deceased planholder.[214] Should the planholder designate his or her estate as the beneficiary, however, the moneys will be available for payment of the creditors of the deceased planholder.

[84] The advantages of this model are simplicity and clarity. This is the rule that now governs insurance RRSP and RRIFs and is easily understood by the public. One disadvantage with this model is that it creates another way to defeat the valid claim of dependants under the *Dependants Relief Act*.[215] For example, an individual could designate a charity or friend as the beneficiary of a RRSP and the moneys would not be available to satisfy a valid claim for support made by a

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[214] Of course, CCRA can always seek payment from the designated beneficiary under the *Income Tax Act*, *supra* note 3, s. 160.2, if the estate assets are insufficient to pay debts. Other creditors of the deceased planholder will have no ability to attach the RRSP, RRIF or DPSP benefit paid upon death of the planholder.

[215] *Supra* note 114.

surviving spouse, adult interdependent partner or child. Another disadvantage with this model is that it places the burden of the tax triggered by the RRSP or RRIF on the beneficiaries of the estate instead of the designated beneficiary of the RRSP, RRIF or DPSP. Assume a parent dies leaving two self-supporting children, Tom and Sally, a house and an RRIF. As of the date of death, the house and RRIF have the same value. The parent has, by instrument, designated Sally as the beneficiary of the RRIF and, in the will, gifted the house to Tom, with the intention of treating them equally. Under this model, Sally will receive all of the moneys in the RRIF at death. However, the house must be sold and the proceeds used to pay the debts of the parent, which will include the tax triggered by the RRIF. In the end result, Tom and Sally will not be treated equally as the parent wished because the parent did not understand the taxation of RRIFs. Of course, the problem of the estate having the tax liability triggered by the RRSP or RRIF, but the plan passing outside the estate to the designated beneficiary, will not arise where the designated beneficiary is a qualified beneficiary[116] for the purposes of the *Income Tax Act* who chooses to defer payment of income tax.

b. Model 2: RRSPs, RRIFs and DPSPs pass outside the estate to certain designated beneficiaries

[85] The second model is a restricted version of the first, designed to minimize some of the disadvantages of that model. Under the second model, the benefits payable under a RRSP, RRIF or DPSP upon the death of the planholder do not form part of the estate of the deceased planholder if the designated beneficiary is the spouse, common-law partner or financially dependent child or grandchild (hereafter the 'protected class'). As the plan is not an asset of the estate of the deceased planholder, it is not available for payment of debts of the deceased planholder. The RRSP, RRIF or DPSP would, however, remain an asset of the estate if the beneficiary designation is someone other than the protected class (e.g. sister or charity) or if the estate itself is the designated beneficiary. In the circumstances in which the plan remains an asset of the estate, the moneys payable from the plan on death of planholder would be available to satisfy claims of creditors of the deceased planholder. This model is designed to protect those individuals who, under the *Income Tax Act*, are entitled to defer payment of tax on the moneys that they receive under a RRSP or RRIF. It thereby greatly reduces the

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[116] See discussion of qualified beneficiary in *supra* note 188.

situations in which the estate has the tax liability triggered by the RRSP or RRIF, but not the asset itself.[217]

[86] The proposed protection arises when there is a valid beneficiary designation in favour of the protected class, and not just when there is a tax deferral under the *Income Tax Act*. This is necessary since tax-deferred transfers are accomplished in different fashions under sections 146 (RRSP), 147 (DPSP) and 147.3 (RRIF) of *Income Tax Act*, and only a surviving spouse or common-law partner is entitled to a tax-deferred transfer of a DPSP.[218] Furthermore, it is important to create some certainty as to what is or is not an asset of the estate at the time of death, and the status of the designated beneficiary at the time of death will create this certainty. Moreover, the policy behind protecting RRSPs, RRIFs and DPSPs from creditors of the planholder to ensure adequate support for the planholder's dependants necessitates protection of the plan for the use of these individuals in all situations, and not just situations in which there is a tax deferral. Therefore, it is better to attach creditor protection to a class of designated beneficiaries as opposed to the availability of a tax-deferred transfer of the RRSP, RRIF or DPSP.

c. *Model 3: Estate model with exemptions for all RRSPs, RRIFs and DPSPs*

[87] The third model treats all moneys paid under a RRSP, RRIF or DPSP on the death of the planholder as an asset of the estate of the deceased planholder and then exempts all of these plans from payment of debts, funeral and testamentary expenses. The exemption would be of a dual nature. On the one hand it must ensure that the protected plans cannot be attached by creditors of the deceased. On the other hand, it must ensure that the personal representative also cannot attach or sell protected plans to raise money to pay debts, funeral and testamentary expenses. The exemption would apply to all plans, whether they passed by way of beneficiary designation or a bequest made in a will.

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[217] It is possible for the estate to pay tax triggered by the RRSP or RRIF even when the designated beneficiary is the surviving spouse. This occurs infrequently, but the surviving spouse and personal representative can choose to include the value of the RRSP or RRIF as income of the deceased planholder.

[218] IT-528: Transfer of Funds Between Registered Plans and IC 77-1R4: Deferred Profit Sharing Plans.

[88] Exemption of certain assets from payment of debts will affect other beneficiaries through the operation of marshalling rules. If RRSPs, RRIFs and DPSPS are exempt from the payment of debts, funeral and testamentary expenses, these exempt plans would be ignored for the purposes of the marshalling rules.[219] This means that other non-exempt assets would be used to pay the debts of the deceased planholder according to the marshalling rules. If the other assets were insufficient to pay the debts, funeral and testamentary expenses, the estate would be insolvent, but the RRSP, RRIF or DPSP would still pass to the designated beneficiary or according to the terms of the will or intestacy provisions. The exempt RRSP, RRIF or DPSP would be distributed on the same basis as would have occurred if the deceased had no debts, funeral and testamentary expenses.

[89] The consequence of this model is that while creditors of the deceased planholder would not be able to attach the plan, the RRSP, RRIF, and DSPS remains an asset of the estate. As an asset of the estate, the plan would still be subject to the claims of dependants under the *Dependant's Relief Act*. This would be the case even when there is a beneficiary designation in favour of an individual. This may be seen as an advantage or a disadvantage, depending upon the circumstances. Clearly if the designated beneficiary is a charity, the assets in the plan should be available to satisfy any order granted under the *Dependant's Relief Act* in favour of a dependant of the deceased planholder. However, it would also allow dependants to make claims against a RRSP, RRIF or DPSP where the designated beneficiary is a spouse, common-law partner or financially dependent child or grandchild. This may not provide the protection of retirement funds that is needed. It does, however, let a court balance the competing claims of family members that arise in the context of second marriages.

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[219] This is not a new development. Exemptions available to the debtor can extend beyond the death of the debtor for the benefit of the debtor's dependants. This places the burden of payment of debts on other assets. See for example, *In re Tatham* (1901), 2 O.L.R. 343 (Ont. H.C.J.). In that case, certain personal property that passed by way of residue was exempt from seizure by creditors of the deceased, and the widow was entitled to retain the exempt goods. This meant that the non-exempt personal property was first used to pay the debts, and the balance of the debts was paid out of specific assets. Had the exemption not existed, all of the personal property that passed by way of residue would have been used to pay the debts, before the specific assets. The result was that the beneficiaries of the specific assets received less than they otherwise would have received.

d. Model 4: Estate model with exemptions for certain RRSPs, RRIFs and DPSPs

[90] This model is a restricted version of model 3. Under model 4, the RRSP, RRIF and DPSP would be an asset of the estate even if there was a beneficiary designation in favour of an individual. However, an exemption would arise where there was a beneficiary designation in favour of a surviving spouse, common-law partner or financially dependent child or grandchild. It is also possible to create an exemption where the RRSP, RRIF and DPSP passes to the estate but the ultimate recipient of the plan is a surviving spouse, common-law partner or financially dependent child or grandchild.

[91] For this model to work, it must be clear how the moneys paid from the RRSP, RRIF or DPSP would be classified for the purposes of the marshalling rules. Presently, where the planholder has designated by will or instrument a beneficiary of a RRSP, RRIF or DPSP, the court treats this as a specific bequest for the purposes of marshalling rules.[79] This would continue to be the case. In the situation where there is no beneficiary designation, or the beneficiary is the estate, the moneys paid from the RRSP, RRIF or DPSP to the estate would be distributed according to the terms of the will. If the testator made no specific gift of the RRSP, RRIF or DPSP assets, then those assets would pass by way of residue under the will. As such it would fall into the first class of assets used to pay debts. In our opinion, the existing law is adequate to deal with the classification of RRSPs, RRIFs or DPSPs for the purpose of marshalling rules. This classification becomes very important when the plan is available for payments of debts of the deceased planholder because it is the marshalling rules that determine which assets are to be used first to pay the debts of deceased planholder.

[92] Under this model, the issue is whether the exemptions should be triggered by the designation in favour of the protected class, or whether it should be triggered by the fact that a member of the protected class ultimately receives the moneys paid from the RRSP, RRIF or DPSP, whether by virtue of the beneficiary

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[79] For example, see *Waugh Estate v. Waugh*, *supra* note 110 and *Pozniak Estate v. Pozniak*, *supra* note 110.

designation, a bequest in a will, or intestacy provision.[22] Those that favour tying the exemption to the existence of a beneficiary designation argue as follows:

(a) It is a simple rule that is easily under stood by the public.

(b) It is not unreasonable to require the debtor to designate a beneficiary who is a surviving spouse, common-law partner or financially dependent child or grandchild in order to receive creditor protection. The other provinces that have created creditor protection for RRSPs, DPSPs and RRIFs upon death of the planholder have tied the protection to designation of a beneficiary who is someone other than the estate itself. This is also a requirement for insurance RRSPs and RRIFs.

(c) There are Albertans who take pride in paying their debts, and they should have the opportunity of having the moneys in a RRSP, RRIF or DPSP paid to their estate for this purpose.

(d) Furthermore, the complexities created by extending this protection outweigh the advantages gained in extending protection. Those complexities include the following:

  (i) If the plan falls into the residue, and the surviving spouse or common-law partner and others are to receive equal shares of the residue, it will not always be clear what portion of the plan is going to the surviving spouse or common-law partner. Assume that the will divides all property of the deceased planholder equally between the surviving spouse and a charity, and that the planholder has designated the estate as the beneficiary of the RRSP. Would half of the RRSP be exempt from payment of debts and pass to the surviving spouse, or would the entire RRSP proceeds be exempt and pass to the surviving spouse but the rest of the estate be used to pay debts? It becomes impossible in some situations to determine what the exemption should be without a complicated set of rules.

  (ii) Often a testator will direct payment of debts and then give the residue to the surviving spouse or common-law partner. What if the other estate assets are not sufficient to pay the debts of the deceased? Should the surviving spouse or common-law partner receive the plan free of claims

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[22] *Trustee Act*, *supra* note 12, s. 47(2) permits the participant to designate a beneficiary of a plan by an instrument signed by the participant or by will. A designation made in a will is still a beneficiary designation pursuant to s. 47 of the *Trustee Act* and is not a bequest under the will.

of creditors notwithstanding the direction that they receive what is left after payment of debts?

(iii) In situations in which the estate is the designated beneficiary or there is no beneficiary designation for the plan, the personal representative and the surviving spouse or common-law partner can still file a joint-election to effectively bring about a tax-deferred transfer of a RRSP to the surviving spouse or common-law partner. What if the surviving spouse is the personal representative? Does this create a conflict between the duty to pay debts and the desire to defeat creditors of deceased? What if the estate is insolvent?

[93] Those that favour creating an exemption that attaches to the RRSP, RRIF or DPSP whenever it ends up in the hand of a protected class member, argue as follows:

(a) Protection should be triggered by the identity of the person who receives the RRSP, RRIF or DPSP upon death of the planholder, and not by the method by which it ultimately falls into the hands of the protected class member. Anything less is inadequate protection for retirement funds found in RRSPs, RRIFs, and DPSPs. The policy of the exemption is to provide financial security to a protected class. It would be contrary to such policy to deprive a member of the protected class of financial security on a mere failure to fill out a special form where the proceeds of the plan might otherwise end up in their hands under a general provision in a will or on an intestacy. The defeat of substance by a failure of form should not be an outcome of law reform.

(b) Traps for the uninformed or unwary are created if an exemption is triggered only by a specific beneficiary designation. It would not be unusual for a person to fail to make a separate beneficiary designation where they have already made a will that leaves all their estate to their spouse. It would not be unusual for a person to think they had made a beneficiary designation when this had not, in fact, been done.

(c) A specifically worded future income plan beneficiary designation contained in a will would be sufficient to give rise to the exemption under any of the models. If a person leaves their entire estate to their spouse by will and has made no specific beneficiary designation in respect of a future income plan, why should this not be sufficient to give rise to the exemption? By leaving their estate to their spouse their clear intent would be to give their spouse the

full benefit of the exemption. The future income plan is included in the gift to the spouse by the plain language of the will. It is counter-intuitive to suggest that the will does not mean what it says. If the future income plan is the only asset of the deceased and the claims of the creditors exceed the plan proceeds, the failure to give effect to the plain meaning of the will would deprive the surviving spouse of the financial security that this law reform measure is intended to provide. Likewise, if there is an intestacy and no beneficiary designation, why should a spouse not receive the benefit of the exemption if the only asset of the deceased is a future income plan and the claims of the creditors of the deceased exceed the plan proceeds. Again the policy of the exemption would be frustrated by a failure of form if the intestacy did not trigger the exemption. What if, when the new legislation comes into effect, a person who otherwise might make a beneficiary designation lacks the capacity to do so? In the two examples given above, their surviving spouse would not receive the benefit of the exemption and this would defeat the policy of the law. In short, a "passive" beneficiary designation (as in the two examples above) should be as effective as an "active" one.

(d) The concerns about estate administration are over stated. This will be an accounting matter and will be handled as many other accounting matters are done in the course of the administration of the estate.

(e) The concerns about the resulting complexity in estate administration do not arise in a situation in which the surviving spouse or common-law partner is the sole beneficiary of the estate.

3. Comparison and analysis

[94] If RRSPs, RRIFs and DPSPs are to be treated identically to pensions, all benefits paid from the plans upon death of the planholder to someone other than the estate would be exempt from attachment by creditors of the deceased planholder. This could be accomplished using either model 1 or model 3. We do not, however, recommend these approaches because of the problems that arise in the administration of estates due to the taxation of RRSPs and RRIFs. In our opinion, there is an inherent unfairness in giving the moneys in the RRSP, RRIF or DPSP to an individual and leaving the tax liability with the estate which no longer has the asset that triggered the liability. Therefore, we prefer a system where the protection arises in those situations in which the moneys may be transferred on a

tax-deferred basis to the designated beneficiary. This will ensure that RRSPs, RRIFs and DPSPs pass to the surviving spouse, common-law partner or financially dependent child or grandchild of the deceased planholder free of claims of creditors. This serves the fundamental policy of ensuring that RRSPs, RRIFs and DPSPs are available for the retirement of the planholder and his or her dependants. At the same time, it minimizes the situations in which the tax liability triggered by the RRSP, RRIF or DPSP remains with the estate, but the asset itself does not.

[95] This brings the choice down to model 2 and 4. In our opinion, model 2 creates the necessary protection, certainty, and desirable flexibility that are needed in the context of death of a planholder. Where a surviving spouse, common-law partner or financially dependent child or grandchild is designated, any benefit payable under the RRSP, RRIF or DPSP upon death of planholder should not form part of the estate of the deceased planholder and should not be subject to claims of the creditors of the deceased planholder. In all other situations, the benefit paid upon death of the planholder from a RRSP, RRIF or DPSP should remain an asset of the estate and be available for satisfaction of creditors of the deceased planholder. This will provide a clear and simple rule for the protection of RRSPs, RRIFs and DPSPs from creditors and will eliminate the complexity in the administration of estates that comes with model 4. While model 2 does remove the asset from the estate, and thereby ensures that that asset is not available to satisfy an order under the *Dependants Relief Act*,[222] this will only occur when a dependant receives the moneys from the RRSP, RRIF or DPSP. This minimizes one of the disadvantages of this model but still creates the creditor protection that is needed for RRSPs, RRIFs and DPSPs. Should a charity be the designated beneficiary of the plan, the plan would remain an asset of the estate and would be available for payment of creditors and for satisfaction of any order granted under the *Dependants Relief Act*.[223]

RECOMMENDATION No. 1
Where a planholder designates a surviving spouse, common-law partner, or financially dependent child or grandchild as the beneficiary of a RRSP, RRIF or DPSP, any

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[222] *Supra* note 114

[223] *Ibid.*

benefit payable under the plan upon the death of the planholder should not form part of the estate of the deceased planholder and should not be subject to claims of the creditors of the deceased planholder. In all other situations, the benefit paid upon death of the planholder from an RRSP, RRIF or DPSP should remain an asset of the estate and should be available for satisfaction of creditors of the deceased planholder. In this recommendation, common-law partner has the meaning given to it in section 248(1) of the federal *Income Tax Act*.

RECOMMENDATION No. 2

Recommendation 1 should apply to all RRSPs, RRIFs and DPSPs, including RRSPs and RRIFs issued by insurance companies and, subject to Recommendation 4, including LIRAs, LIFs and LRIFs.

RECOMMENDATION No. 3

The Canada Customs and Revenue Agency should examine the problems caused in the administration of estates by the current regime for taxation of RRSPs and RRIFs. These problems could be minimized by a withholding tax that applied after death of the planholder, or could be eliminated by taxing the RRSP or RRIF in the hands of the designated beneficiary.

4. Other issues

a. Adult Interdependent Relationships Act

[96] So far our discussion has not taken into account the *Adult Interdependent Relationships Act*[73] ("*AIRA*"), which came into force on June 1, 2003.[74] The purpose of *AIRA* is to bring Alberta legislation in compliance with section 15 of the *Charter of Rights and Freedoms* by ensuring equal treatment of married persons and persons living in similar relationships no matter what their sexual

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[73] S.A. 2002, c. A-4.5

[74] O.C. 202/2003

orientation. *AIRA* does not use a conjugal model of reform; instead, it focuses on relationships of interdependence. Such a relationship will include conjugal relationships outside marriage as well as certain relationships among relatives. This is, in fact, going further than is required to comply with section 15 of the *Charter*.

[97] The definition of adult interdependent partner found in *AIRA* is different than the definition of common-law partner found in the *Income Tax Act*. *AIRA* defines adult interdependent partner as follows:

> 3(1) Subject to subsection (2), a person is the adult interdependent partner of another person if
>
> (a) the person has lived with the other person in a relationship of interdependence
>
> (i) for a continuous period of not less than 3 years, or
>
> (ii) of some permanence, if there is a child of the relationship by birth or adoption
>
> or
>
> (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.
>
> (2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

Relationship of interdependence is defined in section 1(1)(f) as follows:

> (f) 'relationship of interdependence' means a relationship outside marriage in which any 2 persons
>
> (i) share one another's lives,
>
> (ii) are emotionally committed to one another, and
>
> (iii) function as an economic and domestic unit.

Section 248(1) of the *Income Tax Act* defines common-law partner as follows:

> 'common-law partner', with respect to a taxpayer at any time, means a person who cohabits at the time in a conjugal relationship with the taxpayer and
>
> (a) has so cohabited with the taxpayer for a continuous period of at least one year, or
>
> (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(a)(iii),
>
> and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

[98] To a large extent, the definition of common-law partner overlaps with the definition of adult interdependent partner. However, persons living in conjugal relationships outside marriage will become common-law partners before they become adult interdependent partners because the federal legislation requires only one year of cohabitation. Also, non-conjugal relationships do not fall within the definition of common-law partner, but may fall into the definition of adult interdependent partner.

[99] When designing *AIRA*, the Alberta legislature chose to come up with one definition of adult interdependent partner that would, subject to a few exceptions, be used throughout Alberta legislation.[75] The use of one definition in Alberta statutes makes the law less confusing and will be easier for the public to understand. "Adult interdependent partner" as defined in the *AIRA* is used in 63 Alberta statutes. Different definitions are, however, used in the *Alberta Personal Income Tax Act*,[76] *Assured Income for the Severely Handicapped Act*,[77] the *EPPA*[78] and regulations enacted under the *PSPPA*.[79] The *Alberta Personal Income Tax Act* adopts the definition of common-law partner used in the *Income Tax Act*. The *EPPA* uses pension partner, as do the regulations enacted under the *PSPPA*. However, the definition of pension partner for private-sector pensions differs from that used for public-sector pensions.[80] Neither definition of pension

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[75] Consequential amendments to the *Civil Enforcement Act*, *supra* note 160 and the *Insurance Act*, *supra* note 11 introduced by *AIRA* use this term. For example, s. 580(2) of the *Insurance Act* will be amended by adding "or adult interdependent partner" after "spouse".

[76] R.S.A. 2000, c. A-30.

[77] R.S.A. 2000, c. A-45.

[78] *Supra* note 58.

[79] See the regulations cited in *supra* note 73.

[80] The *EPPA*, *supra* note 58 defines "pension partner" as follows:

> 1(1.6)(ll.1) "pension partner" means, in relation to another person,
>
> (i) a person who, at the relevant time, was married to that other person and had not been living separate and apart from that other person for 3 or more consecutive years, or
>
> (ii) if there is no person to whom subclause (i) applies, a person who, immediately preceding the relative time, had lived with that other person in a conjugal relationship
>
> (A) for a continuous period of at least 3 years, or
>
> (B) of some permanence, if there is a child of the relationship by birth or

(continued...)

partner includes non-conjugal relationships of interdependence or relatives who have an interdependent partner agreement. The *Assured Income for the Severely Handicapped Act* uses the term 'cohabiting partner' that is defined in the regulations.[232] The terminology chosen for the *Alberta Personal Income Tax Act*, the *EPPA* and the regulations enacted under the *PSPPA* is influenced by the interrelationship these statutes have with the federal *Income Tax Act*.

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[231] (...continued)

adoption;

The regulations enacted under the *PSPPA*, *supra* note 72 each have the same definition of pension partner and it is found in section 2(1)(dd.1) of each regulation. For example, the *Local Authorities Pension Plan*, *supra* note 73 defines pension partner as follows:

s. 2(1)(dd.1) "pension partner" means

(i) a person who, at the relevant time, was married to a participant or former participant and

(A) was not judicially or otherwise separated from him or her, or

(B) if so separated, was wholly or substantially dependent on him or her,

(ii) if there is no person to whom subclause (i) applies, a person who, as at and up to the relevant time, had lived with the participant or former participant in a conjugal relationship

(A) for a continuous period of at least 3 years, or

(B) of some permanence, if there is a child of the relationship by birth or adoption,

and was, during that period or that relationship, as the case may be, held out by the participant or former participant in the community in which they lived as being in that conjugal relationship, or

(iii) if there is no person to whom subclause (i) or (ii) applies, a person who was married to but separated from the participant or former participant and not wholly or substantially dependent on him or her at the relevant time;

[232] The *Assured Income for the Severely Handicapped Regulation*, A.R. 203/99 as am. defines "cohabiting partner" as follows:

1(1) For the purposes of the Act,

(a) "cohabiting partner" means a person

(i) with whom the applicant or recipient has entered into an adult interdependent partner agreement under section 7 of the Adult Interdependent Relationships Act,

(ii) with whom, in the opinion of the Director, the applicant or recipient is living in a relationship of interdependence as defined in the Adult Interdependent Relationships Act,

(iii) with whom the applicant or recipient is living and has a child or has adopted a child, or

(iv) with whom the applicant or recipient has a relationship described in subclause (i), (ii) or (iii) and has a financial interdependency, other than for the support of children, but does not reside with the applicant or recipient,

but does not include a person who is related by blood or adoption to the applicant or recipient unless the person has entered into an adult interdependent partnership agreement under section 7 of the Adult Interdependent Relationships Act.

[100] Should our recommendations reflect the government policy of treating married persons and adult interdependent partners in the same fashion, or is this an area of the law in which the terminology of the *Income Tax Act* should prevail? If it were not for the present rules regarding taxation of RRSPs and RRIFs, we would have recommended that the RRSP, RRIF or DPSP not form part of the estate whenever the planholder has designated a spouse, adult interdependent partner or dependent child or grandchild as the beneficiary of the plan. We support the use of a uniform definition of adult interdependent partner in Alberta legislation whenever possible. However, the present rules regarding taxation of RRSPs and RRIFs have caused us to take a different approach in this situation. In our opinion, the protected class must be spouse, common-law partner and financially dependent child or grandchild as defined in the *Income Tax Act*.

[101] The rationale for using the *Income Tax Act* terminology is twofold. First, we are trying to minimize the situations in which the tax liability triggered by the RRSP or RRIF remains with the estate, but the asset itself is not available to pay the debt. In order to avoid the unfairness of these situations, protection should be extended to those designated beneficiaries who are able to defer payment of tax upon receipt of benefits paid from the RRSP, RRIF or DPSP upon death of the planholder. As far as possible, we wish to create protection only for qualified beneficiaries under the *Income Tax Act*. Use of 'adult interdependent partner' will not catch all of these tax deferred transfers, and will include some situations in which the tax cannot be deferred. Second, the terminology used in the *Income Tax Act* is designed to treat all conjugal relationships equally no matter what the sexual orientation or marital status. At this stage in the development of Charter law, there is no constitutional requirement that conjugal relationships be treated in the same fashion as non-conjugal relationships. For these reasons, we recommend use of the terminology found in the *Income Tax Act*.

[102] Under the *Income Tax Act*, it is assumed, unless the contrary is established, that a child or grandchild was not financially dependent upon the planholder for support as of the date of death if the child's income for the year before death exceeded the basic personal deduction. While it may be necessary for the administration of the *Income Tax Act* to have such a working premise, it is not necessary in this context. Nothing is gained by adding this assumption because it will always be a question of fact whether the child was or was not financially

dependent upon the deceased planholder. Furthermore, the assumption causes problems when applied to mentally or physically challenged children who receive AISH payments. The AISH payments received in a year by a child exceed the basic personal deduction but these children are often still financially dependent upon their parents. For this reason, we do not include the working assumption found in the *Income Tax Act* for determining when a child is financially dependent upon the deceased planholder. Under our proposals, this will be a question of fact to be determined in each situation.

b. Is additional protection needed for LIRAs, LIFs and LRIFs?

[103] As discussed in Chapter 2, one of the distinguishing features of LIRAs, LIFs and LRIFs is the protection created for the surviving pension partner by pension legislation and the contract itself.[233] So notwithstanding the fact that the planholder may have designated someone else, the pension partner will receive the LIRA, LIF or LRIF in certain situations. Protection of the surviving pension partner is a key component of Alberta pension legislation and should continue. A surviving pension partner should receive the benefit of the LIRA, LIF or LRIF free from claims of the creditors of the deceased planholder. Protection tied to the existence of a beneficiary designation in favour of a surviving spouse, common-law partner or dependent child or grandchild is insufficient to create the protection needed for pension partners. Pension partners are protected by pension legislation by reason of their status, and not by reason of the existence of a beneficiary designation. Therefore, we propose that whenever a pension partner receives a benefit under a LIRA, LIF or LRIF upon death of the planholder, the benefit should not form part of the estate of the deceased planholder and should not be available for payment of creditors of the deceased planholder. The benefit should vest in the pension partner notwithstanding the existence of a beneficiary designation in favour of another. This should not create a taxation problem for the estate because all pension partners will be entitled to defer payment of tax under the *Income Tax Act* as they will fall into the definition of surviving spouse or common-law partner found in the *Income Tax Act*. The definitions used in the *Income Tax Act* are broader than

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[233] As already discussed, "pension partner" is defined differently in the *EPPA*, *supra* note 58 as compared to the regulations enacted under the *PSPPA*, *supra* note 72. These definitions are set out in note 231.

the definition of pension partner used in the EPPA and the regulations under the *PSPPA*.[234]

[104] In the situations in which there is no surviving pension partner, the benefit is paid to the designated beneficiary, if any. In these situations, the benefit should not form part of the estate of the deceased planholder when the designated beneficiary is the surviving spouse, common-law partner or financially dependent child or grandchild of the deceased employee. It is necessary to include surviving spouses and common-law partners in this context because while most surviving spouses and common-law partners will also be pension partners, this is not always the case. Two examples will illustrate the difference between the definitions. First, married persons who have lived separate and apart for more than three years would not be pension partners as defined in the *EPPA* but would be considered spouses under the *Income Tax Act*. All married persons who cohabit would be pension partners as defined in the *EPPA* and the regulations under the *PSPPA*. Second, a conjugal couple that cohabits for one year would be a common-law partner under the *Income Tax Act*, but would not be pension partners under the *EPPA* until they had cohabited for three years or there was a child of the relationship by birth or adoption.

[105] In all other situations, the LIRA, LIF and LRIF will remain an asset of the estate and be available for satisfaction of creditors of the deceased planholder. For example, a LIRA, LIF or LRIF that is payable to the estate or to a designated beneficiary that is a charity or sibling will be available for satisfaction of creditors of the deceased planholder.

RECOMMENDATION No. 4
Upon death of a planholder, any benefit payable under a LIRA, LIF or LRIF:

(a) to a pension partner as defined under the applicable pension statute, or

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[234] A conjugal couple that lives outside marriage must cohabit for 3 years to be pension partners under the *EPPA*, *supra* note 58 but would be common-law partners under the *Income Tax Act*, *supra* note 3 after cohabitation for 1 year.

(b) pursuant to a valid beneficiary designation in favour of a surviving spouse, common-law partner or financially dependent child or grandchild

should not form part of the estate of the deceased planholder and will not be subject to claims of the creditors of the deceased planholder.

c. *Where should the proposed provision be located?*

[106] Except for the protection of the pension partners, the proposed creditor protection hinges on the existence of a valid beneficiary designation in favour of the surviving spouse, common-law partner or financially dependent child or grandchild of the deceased planholder. The proposed creditor protection will apply to ordinary RRSPs, RRIFs and DPSPs, RRSPs and RRIFs issued by insurance companies, and LIRAs, LIFs and LRIFs. Protection that depends upon the existence of a valid beneficiary designation is usually found with the legislation dealing with beneficiary designations.[75] But in this case, both the *Insurance Act* and section 47 of the *Trustee Act* will determine the validity of a beneficiary designation in certain situations. The provisions of the *Insurance Act* deal with the validity of a beneficiary designation in respect of a RRSP or RRIF issued by an insurance company. Section 47 of the *Trustee Act* deals with the validity of a beneficiary designation in respect of all other RRSPs or RRIFs, and DPSPs, including LIRAs, LIFs and LRIFs. In this context, the placement of the provision is not immediately obvious.

[107] The proposed legislation could be located in one statute and apply to all RRSPs, RRIFs and DPSPs, including insurance products and LIRAs, LIFs, LRIFs; or similar provisions could be placed in a variety of statutes. If the proposed legislation was to be placed in one statute, it could be located in the *Trustee Act* or a stand-alone statute dealing with the validity of beneficiary designations that are not governed by the *Insurance Act*. This provision would apply notwithstanding section 580(1) of the *Insurance Act* and would limit that section as it applies to

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[75] In British Columbia the provisions are included in the *Law and Equity Act*, *supra* note 107, ss. 49-51 that deal with the validity of beneficiary designations. The *Designation of Beneficiaries Under Benefit Plans Act*, *supra* note 107 of Prince Edward Island is a stand-alone statute that deals only with the validity of beneficiary designations and when a plan forms part of the estate of the deceased planholder on death. Neither of these statutes applies to insurance products.

RRSPs or RRIFs. If similar provisions were placed in a variety of statutes, amendments to the *Insurance Act*, pension legislation and the *Trustee Act* would be necessary. Section 580(1) of the *Insurance Act* would be amended to narrow the protection presently created for RRSPs and RRIFs by that section. Protection for non-insurance RRSPs and RRIFs, and DPSPs, would be located in the *Trustee Act* or in a stand-alone statute dealing with the validity of beneficiary designations. Protection for LIRAs, LIFs and LRIFs would be placed in the various pension statutes.

[108] In our opinion, locating the protection in one statute is preferable. The *Trustee Act* should be amended to include a new section 47.1 that deals with all RRSPs, RRIFs and DPSPs, including insurance products and LIRAs, LIFs and LRIFs. We do not recommend that the proposals be placed in section 47 because that section does not apply to a designation of a beneficiary to which the *Insurance Act* applies.[28] But a new section 47.1 of the *Trustee Act* or a separate statute dealing only with beneficiary designation would be an appropriate place to put the proposed legislation. We do not favour the placement of similar provisions in various statutes such as the *Insurance Act*, pension legislation and the *Trustee Act*. The danger is that over time the provisions will drift away from each other leading to different protection depending upon the identity of the plan administrator or the nature of the funds used to purchase the RRSP or RRIF. This is not desirable. Moreover, there is no difference among insurance RRSPs and RRIFs, locked-in RRSPs and RRIFs, and ordinary RRSPs and RRIFs that would justify differential treatment in respect of creditors of the deceased planholder. The other advantage of placing the protection in one statute is that there is no need to amend the *Insurance Act* which is based on the *Uniform Life Insurance Act*. It must be clear, however, that section 580(1) of the *Insurance Act* will continue to apply to all life insurance contracts except RRSPs and RRIFs. It must also be clear that all the other provisions in the *Insurance Act* that presently apply to RRSPs and RRIFs will continue to apply. The only change being made relates to when RRSPs and RRIFs that are issued by an insurance company pass outside the estate of the deceased planholder. Therefore, this is best done in a section that deals with this issue for all RRSPs, RRIFs and DPSPs.

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[28] *Trustee Act*, *supra* note 12, s. 47(17).

[109] The recommendations will not affect the *EPPA* because this statute does not address whether a LIRA, LIF or LRIF vests in the pension partner or designated beneficiary upon death of the planholder. When the commuted value of a pension is transferred from a public-sector plan to a LIRA, the *EPPA* and regulations apply rather than the public-sector plan rules.[37] Given this provision, it is unlikely that any LIRA in existence at the time of the death of the planholder would be governed by section 12(3) of the *Public Sector Pension Plans (Legislative Provisions) Regulations*. This section provides as follows:

> 12(3) A benefit paid on the death of any person otherwise than to the personal representative of a deceased's estate is not part of the estate of the deceased and is not subject to the claims of his creditors.

But if that section is applicable to LIRAs, LIFs or LRIFs owned by the planholder at the time of death, it should be overridden by the proposed protection. In addition, the creditor protection extended to LIRAs, LIFs or LRIFs in section 85 of the *EPPA* would have to be restricted in the context of death of the planholder.

RECOMMENDATION No. 5
The new section dealing with whether RRSPs, RRIFs and DPSPs remain an asset of the estate of the deceased planholder should be part of the *Trustee Act* and should apply notwithstanding any other Act or law.

d. Payment of RRSP, RRIF of DPSP to estate

[110] Upon death of an individual, the real and personal property of the deceased (other than property that passes by right of survivorship or that ceases to exist on death) vests in the personal representative of the deceased and is held in trust for the beneficiaries of the deceased. In the case of an executor, the assets vest in the executor immediately upon death of the deceased testator. In the case of an administrator, the assets vest in the administrator once the court has granted a grant of administration. As legal owner of the deceased's assets, the personal representative is authorized to take possession of the assets of the deceased and administer them.

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[37] See s. 34 of each regulation governing a specific plan. For example, see *Local Authorities Pension Plan*, *supra* note 73, s. 34.

[111] The distinguishing feature of RRSPs, RRIFs and DPSPs that have a beneficiary designation is that subsection 47(13) of the *Trustee Act*[28] enables the designated beneficiary to enforce payment of the benefit and thereby authorizes the plan administrator to pay the benefits directly to the designated beneficiary. In a business context this is desirable because it is a quick and effective method of placing the benefit in the hands of the designated beneficiary. It does not cause any problems in the majority of situations because often the plan is not needed for payment of debts since the personal property that passes by way of residue is sufficient to pay debts. Problems do arise, however, when the RRSP, RRIF or DPSP remain an asset of the estate and the personal representative needs the assets in the plan to pay debts, or where the marshalling rules would require the designated beneficiary of the plan to contribute to payment of debts.

[112] The practical difficulty arises because the beneficiary designation authorizes the plan administrator to pay the benefit to the designated beneficiary.[29] However, if the RRSP, RRIF or DPSP remains an asset of the estate, the asset vests in the personal representative who is empowered to gather in the asset if this is required to pay debts, funeral and testamentary expenses. Yet, given the wording of subsection 47(13) of the *Trustee Act*, it is unclear whether or not a personal representative can cause the plan administrator to pay the moneys in the RRSP, RRIF or DPSP to the estate. The case law shows that in situations of insolvency or dispute, the plan administrator may receive competing requests for the money and respond by paying the money into court or paying the money into a lawyer's trust account to await determination of who is entitled to the moneys. In other situations, the administrator pays the money to the designated beneficiary and then the personal representative commences an action against the designated beneficiary requesting a return of the funds.

[113] This problem does not arise if the RRSP, RRIF or DPSP passes outside the estate of the deceased. However, any reform model in which a RRSP, RRIF or DPSP with a valid beneficiary designation remains an asset of the estate must deal with the practicalities of distribution of such plans to the designated beneficiary in

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[28] *Supra* note 12.

[29] *Trustee Act*, *ibid.*, ss. 47(13) and (15).

the most efficient and timely manner. Under our recommendations, certain RRSPs, RRIFs and DPSPs will remain an asset of the estate. The estate assets will include any plan with a valid beneficiary designation in favour of an individual other than a surviving spouse, common-law partner or financially dependent child or grandchild. For example, a RRSP would be subject to claims of creditors of the deceased planholder even though there is a valid beneficiary designation by instrument or will in favour of a friend, charity or sibling. As explained above, it is presently unclear whether a personal representative could attach such a plan before it is paid to the designated beneficiary.

[114] In most cases, the debts of the estate will be paid out of the personal property that passes by way of residue and, therefore, the personal representative has no need to gather in the RRSP, RRIF or DPSP that is payable to the designated beneficiary. It is only in situations involving an insolvent estate, or a situation in which the marshalling rules require the designated beneficiary to contribute to payment of debts, funeral and testamentary expenses that the personal representative may have to gather in the RRSP, RRIF or DPSP.

[115] There should be a method for the personal representative to collect the RRSP, RRIF or DPSP that remains an asset of the estate when such an asset is needed for payment of debts or is subject to contribution under the marshalling rules. As the future income plans remain an asset of the estate, it is submitted the personal representative should be able to attach the asset in the hands of the plan administrator. Therefore, section 47 of the *Trustees Act* would have to be amended to allow the plan administrator to pay the benefits to the personal representative of the estate when the plan remains an estate asset. The general rule would be that the plan administrator could pay the designated beneficiary unless sometime before payment the personal representative gave the administrator notice that the plan was an estate asset and was to be paid to the personal representative. This would give the plan administrator the ability to follow its normal procedure unless they are put on notice by the personal representative. It is assumed that the personal representative would only ask for the plan if the estate was insolvent or when the designated beneficiary must contribute to payment of debts by virtue of the marshalling rules. In other words, the practicalities of estate administration would dictate when the personal representative would gather in the plan that forms part of the estate. Therefore, one could leave this point to common sense or it could be set

out in the *Administration of Estates Act* or in section 47 of the *Trustee Act* itself. Of course, if the plan does not form part of the estate, the plan administrator should pay the moneys in the plan to whomever is entitled to the plan. For example, a RRSP with a beneficiary designation in favour of a surviving spouse would be property of the surviving spouse and should be paid as that spouse directs. The personal representative would not be able to gather in that asset because it is not an estate asset. Query what would happen if there was a dispute as to whether the survivor was a common-law partner? This might be an appropriate situation for the administrator of the plan to pay the moneys into court.

5. Transition

(116) The proposed legislation should apply in the event of death of a planholder that occurs on or after the date that the legislation comes into force, and should apply to all money in the plan at the time of death no matter when the money was paid into the plan.

RECOMMENDATION No. 6

The new section should apply in the event of death of a planholder that occurs on or after the date that the legislation comes into force.

Chapter 4. Should RRSPs, RRIFs and DPSPs be Exempt From Attachment by the Creditors of the Designated Beneficiary or Pension Partner?

[117] In this chapter, we look at the issue of creditor protection vis-à-vis the creditors of the designated beneficiary or surviving pension partner. We begin with the situations in which a benefit is payable under the plan to a designated beneficiary and then deal separately with the situations involving LIRAs, LIFs and LRIFs.

A. Designated Beneficiaries

[118] In this part, we look at the issue of creditor protection vis-à-vis the creditors of the designated beneficiary of all RRSPs, RRIFs and DPSPs, except LIRAs, LIFs and LRIFs. Should such RRSPs, RRIFs and DPSPs, and the proceeds from such plans be exempt from creditors of the beneficiary? The four commentators who responded to this issue[40] did not favour creditor protection in this circumstance. These commentators were of the opinion that the policy of protecting retirement savings for an individual did not justify protection in this situation. One commentator did qualify this response by saying that where provincial pension legislation protects payments to surviving spouse, similar protection should extend to a spouse designated under an RRSP or similar plan. Another commentator implied that protection should be available only to the individual and his or her family.

[119] In examining this issue, we must separate the discussion concerning designated beneficiaries who are the surviving spouse, common-law partner or dependent child or grandchild from all other beneficiaries. To distinguish between the two groups, we will refer to them as qualified beneficiaries and ordinary beneficiaries, respectively. Where the deceased planholder has designated an ordinary beneficiary, the plan remains an asset of the estate. Assuming the plan is not needed to pay the debts of the deceased, the plan administrator will collapse the plan and pay the proceeds to the ordinary beneficiary. The *Income Tax Act*

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[40] Alberta Law Reform Institute, *Creditor Access to Future Income Plans* (Consultation Memorandum No. 11) (Edmonton: Alberta Law Reform Institute, 2002), Issue 10.

does not allow deferral of payment of tax when the designated beneficiary is an ordinary beneficiary. In this situation, the creditors of the ordinary beneficiary should be allowed to attach the moneys in the plan payable to the ordinary beneficiary. Of course, what the beneficiary will receive will depend upon whether some or the entire plan is needed to pay the debts of the deceased planholder.

[120] The situation involving a designated beneficiary who is a qualified beneficiary for the purposes of the *Income Tax Act* is different. In Chapter 3, we recommended that if there is a beneficiary designation in favour of the surviving spouse, common-law partner or financially dependent child or grandchild of the planholder, the RRSP, RRIF or DPSP will not form part of the estate of the deceased planholder. At the moment of death, the assets in the RRSP, RRIF or DPSP will become the property of the designated beneficiary. This will protect the RRSP, RRIF or DPSP from the creditors of the deceased planholder, but it may not always protect the plan from the creditors of the surviving spouse, common-law partner or dependent child or grandchild.[241]

[121] Several scenarios should be examined. There will be a time between death and when either:

(1) the plan is collapsed and the moneys are paid to the surviving spouse, common-law partner or dependent child or grandchild, or

(2) the assets or funds are transferred to a RRSP, RRIF or annuity owned by that person.

In this period, should the creditors of the qualified beneficiary be able to attach the assets in the plan? In our opinion, the creditors of the surviving spouse, common-law partner or financially dependent child or grandchild should not be allowed to attach the assets in the plan. The ability to do this would defeat the creditor protection that is necessary if retirement savings are to be available for the support of dependants of the deceased planholder. Therefore, we recommend that the RRSP, RRIF or DPSP and obligation to pay moneys from such plans be completely exempt from all remedies of judgment creditors of a designated

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[241] In the context of life insurance, the creditors of the insured cannot attach the life insurance proceeds paid upon death of the insured. However, the creditors of designated beneficiary can garnishee the life insurance that becomes payable upon death of the insured to the designated beneficiary. See *Ryan v. Eatock*, [1943] O.W.N. 590 (Ont. H.C.J.) and *Doull v. Doelle* (1905), 10 O.L.R. 411 (Ont. Div. Ct.); Norwood & Weir, *supra* note 12 at 357; C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Carswell, 1995) at 499.

beneficiary who is a surviving spouse, common-law partner or dependent child or grandchild.

[122] We now examine the scenarios that involve a direct transfer of the plan and collapse of the plan. Clearly, if there is a direct transfer of the plan assets to a plan of a qualified beneficiary (and this is often the means of accomplishing a tax-deferred transfer),[242] the creditors of the beneficiary will not be able to attach the assets in the new plan under the proposed regime. RRSPs, RRIFs and DPSPs will not be subject to attachment by creditors of the new planholder (i.e. the beneficiary).[243] But what happens if the plan is collapsed[244] and money is paid to the qualified beneficiary? Even if the proceeds in the hands of the plan administrator are exempt from attachment by the creditors of the qualified beneficiary, it is difficult to continue such protection once the money is paid into the beneficiary's bank account. This problem is not unique to the area of RRSPs, RRIFs and DPSPs. It also arises in respect of wages and pension benefits. There are circumstances in which exempt wages or monthly pension benefits deposited in bank accounts can be garnisheed by creditors.[245] The exception is payments made to the enforcement debtor in respect of social allowance, AISH and a widow's pension under the *Widows' Pension Act*,[246] but only if the proceeds are not intermingled with any other funds of the enforcement debtor.[247] Sale proceeds of exempt property are also exempt for a period of 60 days from sale if those

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[242] See IT-528 Transfer of Funds Between Registered Plans.

[243] See recommendations made in ALRI: Rep. 91, *supra* note 1.

[244] Collapse of the plan will occur when the designated beneficiary is someone other than a qualified beneficiary or when, for some tax-related reason, the surviving spouse or common-law partner wishes to trigger payment of tax by the estate.

[245] In *Holy Spirit Parish Credit Union v. Kwiatkowski* (1969), 68 W.W.R. 684 (Man. Q.B.), the judge held that "although wages deposited directly into a bank account by the debtor's employer are still wages and subject to the exemption until they are removed from the account, they would not have been exempt in a bank account if they had been paid to and deposited by the debtor, or if they had been removed from the original account and deposited into another". Quote from Alberta Law Reform Institute, *Enforcement of Money Judgments* (Report No. 61) (Edmonton: Alberta Law Reform Institute) v. 1 at 319-20 [ALRI: Report No. 61].

[246] R.S.A. 2000, c. W-7.

[247] *Civil Enforcement Regulation*, A.R. 276/95, s. 37(2)(b). See also ALRI: Report No. 61, *supra* note 245, v. 1 at 319-320.

proceeds are not intermingled with any other funds of the enforcement debtor.[248] Given that a direct transfer of assets from one plan to another is usually needed to obtain a tax deferral for the RRSP, RRIF or DPSP, we do not recommend additional protection for the unusual situation in which the moneys are paid directly to the qualified beneficiary. If the surviving spouse, common-law partner, or dependent child or grandchild has enforcement creditors, they should ensure that the assets in the plan are directly transferred to another plan or life annuity.[249]

B. LIRAs, LIFs and LRIFs

[123] As discussed earlier in the report, pension legislation gives rights to surviving pension partners that supercede those of the designated beneficiary. So notwithstanding that the planholder may have designated someone else, the pension partner will receive the LIRA, LIF or LRIF in certain situations. This benefit arises by virtue of the status of the pension partner, and not by reason of a beneficiary designation. Protection of the surviving pension partner is a key component of Alberta pension legislation and should continue. To accomplish this, it must be clear that creditors of the pension partner cannot attach the LIRA, LIF or LRIF during the lifetime of the pension partner. This will continue the protection that already exists for pension partners under pension legislation. Should there be no pension partner, the LIRA, LIF or LRIF will be paid to any designated beneficiary of the plan holder. We do not, however, recommend that payments to all designated beneficiaries be exempt from remedies of creditors of the designated beneficiaries. For the reasons given under the previous heading, we recommend that LIRAs, LIFs and LRIFs be exempt from all remedies of any designated beneficiary who is a surviving spouse, common-law partner or dependent child or grandchild. In our opinion, the current blanket protection created by pension legislation for all LIRAs, LIFs and LRIFs goes beyond what is necessary to ensure that such plans are available for the planholder and his or her dependants.

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[248] *Civil Enforcement Regulation, ibid.*, s. 37(2)(a).

[249] This is an option available for RRSPs, RRIFs and DPSPs. However, the ability to transfer moneys from a DPSP to another plan is more limited. See T4RSP AND T4RIF Guide, T4079(E) Rev. 02 at Appendix E – Information for transfers of funds.

RECOMMENDATION No. 7

(a) Upon death of the planholder, the RRSP, RRIF or DPSP and obligation to pay moneys from such plans should be exempt from all remedies of judgment creditors of:
   (i) a surviving pension partner (where applicable), and
   (ii) a designated beneficiary who is a surviving spouse, common-law partner or dependent child or grandchild.

(b) Additional protection is not needed in the situation in which the fund is collapsed and moneys are received by the designated beneficiary.

PART IV — DRAFT LEGISLATION

Trustee Amendment Act

(1) The *Trustee Act* is amended by this Act.

(2) The following is added after section 47:

Exemption of registered plans
48(1) In this section,

(a) "DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;

(b) "enforcement process" means writ proceedings, attachment orders under Part 3 of the *Civil Enforcement Act* and any other prejudgment and post-judgment remedies under any other enactment or law that may result in a money judgment, but does not include a remedy of a secured creditor enforcing the secured creditor's security;

(c) "federal Act" means the *Income Tax Act* (Canada);

(d) "plan holder" means

(i) with respect to a DPSP, an employee within the meaning of section 147 of the federal Act,

(ii) with respect to an RRIF, an annuitant as defined in section 146.3 of the federal Act, and

(iii) with respect to an RRSP, an annuitant as defined in section 146 of the federal Act;

(e) "qualified beneficiary" means

(i) the surviving spouse or common-law partner, as defined in the federal Act, of the plan holder,

(ii) a financially dependent child or grandchild of the plan holder, and

(iii) the surviving pension partner, under the applicable pension legislation, of the plan holder;

(f) "registered plan" means a DPSP, an RRIF or an RRSP;

(g) "RRIF" means

(i) a registered retirement income fund as defined in section 146.3 of the federal Act, and

(ii) a retirement income arrangement as defined in the *Employment Pension Plans Act*;

(h) "RRSP" means

(i) a registered retirement savings plan as defined in section 146 of the federal Act,

(ii) a locked-in retirement account as defined in the *Employment Pension Plans Act*, and

(iii) any other account similar to the account referred to in subclause (ii).

(2) A benefit payable under a registered plan to a qualified beneficiary on the death of the plan holder

(a) does not form part of the estate of the deceased plan holder and is not subject to the claims of creditors of the deceased plan holder, and

(b) is exempt from any enforcement process against the qualified beneficiary.

(3) This section applies in respect of a plan holder who dies on or after the date this section comes into force.

(4) If a provision of this section is inconsistent or in conflict with a provision of another enactment, the provision of this section prevails unless the other enactment expressly provides that it, or a provision of it, prevails notwithstanding this section.

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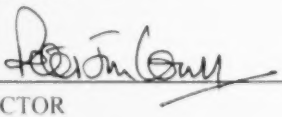

DIRECTOR

May 2004